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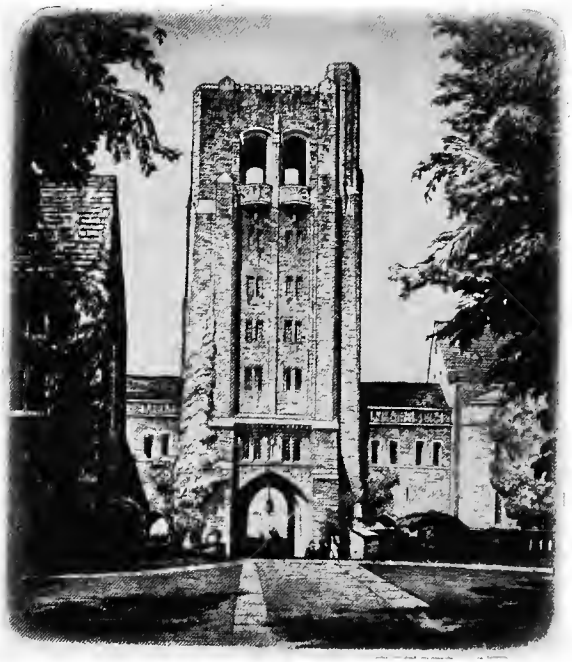

A

MANUAL OF THE PRACTICE

OF THE

SUPREME COURT OF JUDICATURE.

A

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OF THE

SUPREME COURT OF JUDICATURE

IN THE

Queen's Bench, Common Pleas, Exchequer,

AND

Chancery Divisions.

INTENDED FOR THE USE OF STUDENTS.

BY

JOHN INDERMAUR,

SOLICITOR;

(CLIFFORD'S INN PRIZEMAN, MICH. TERM, 1872; AUTHOR OF 'PRINCIPLES OF THE COMMON LAW,' AND OTHER WORKS FOR STUDENTS.)

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PREFACE.

In September, 1875, I published a guide to the Supreme Court of Judicature Acts, 1873 and 1875, in the shape of Questions and Answers, considering that, at that time, the most useful way of bringing the subject of the new practice before the Student. Over two years having elapsed since the Judicature Acts came into operation, and the practice having become somewhat settled, it may be now advantageously considered as a whole, and not simply with reference to the alterations made by the Acts.

My object in writing the present work has been to give to the Student, as shortly and simply as possible, such an elementary view of the proceedings in the Queen's Bench, Common Pleas, Exchequer, and Chancery Divisions of the High Court of Justice as will enable him to satisfactorily pass any reasonable examination on the subject. I have specially aimed at avoiding details which have appeared to me unnecessary or beyond the scope of the book, and also at putting the subject matter in as short form as is con-

sistent with a proper explanation. If in any points it should be that I have been too brief, the references given throughout will furnish the means of acquiring further information or explanation.

If my object has been successfully attained, I think I shall have supplied a great want which at the present time exists, especially amongst Students for the Final Examination of the Incorporated Law Society.

I have to thank my friend and former pupil Mr. T. Eustace Smith for his assistance in preparing the Index.

J. I.

22 Chancery Lane, W.C.
March 1878.

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A

MANUAL OF THE PRACTICE

OF THE

SUPREME COURT OF JUDICATURE.

PART I.

OF THE COURTS, THE JUDGES AND OFFICERS THEREOF; AND OF PARTIES TO ACTIONS AND JOINDER OF CAUSES OF ACTION.

CHAPTER I.

THE FORMER COURTS AND THE PRACTICE THEREIN.

THE Supreme Court of Judicature Acts of 1873 (*a*) and 1875 (*b*), although to a great extent constituting in themselves a new practice, yet require at the outset for their proper understanding some slight explanation of the former Courts, and the practice therein, especially as, where no provision is made on the subject, the jurisdiction of the Courts is to be exercised as nearly as can be in the same manner as formerly (*c*). All, however, that is sought in the present chapter is to give the student some information purely general in its nature.

The Courts of Common Law were older in their origin than the Court of Chancery, being, indeed, the

The Courts of Common Law.

(*a*) 36 & 37 Vict. c. 66.
(*b*) 38 & 39 Vict. c. 77.
(*c*) Jud. Act, 1873, s. 23.

outcome of a very ancient body called the *Aula Regis*. They were three in number, viz., the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer. At the time the Judicature Acts came into operation actions were brought in common in any one of these Courts as the litigant chose, but each had also some exclusive jurisdiction; particularly the Court of Queen's Bench had an exclusive jurisdiction over inferior jurisdictions, and also a general criminal jurisdiction; the Court of Common Pleas had an exclusive jurisdiction in actions relating to dower, and by 6 Vict. c. 18, s. 60, in appeals from decisions of revising barristers as to registration of electors; and the Court of Exchequer had an exclusive jurisdiction in revenue matters.

Former Judges at Common Law.

At the time the Judicature Acts came into operation the Courts of Common Law comprised fifteen Judges, viz., the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and twelve puisne Judges, or Judges of less degree. Appeals lay, in the first instance, to a Court known as the Exchequer Chamber, and from thence to the House of Lords.

The Court of Chancery.

The Court of Chancery arose from the defects of these Courts of Common Law. For every right there was supposed to exist at Common Law a certain proper form of writ, but for some rights for which clearly relief ought to have been given no form of writ was found, and the practice therefore grew up of applying to the Sovereign in person, asking him as a matter of favour to give the required remedy. The Sovereign generally deputed such applications to his Lord Chancellor, and therefore gradually the practice grew up of applying direct to the Chancellor, who thus in himself originally constituted the Court of Chancery (*d*).

(*d*) See Haynes' Outlines of Eq. pp. 11–18.

Former Judges in Chancery.

At the time of the coming into operation of the Judicature Acts the Court of Chancery comprised seven Judges, viz. the Lord Chancellor and two Lords Justices, constituting—either sitting together or separately—a Court of Appeal, and the Master of the Rolls and three Vice-Chancellors. The Lord Chancellor, as before explained, was the first Judge in Chancery (*e*); the Master of the Rolls was originally merely a master in Chancery to whom certain matters were referred, and by a gradual development his position assumed that of an independent judge, being finally settled by statute (*f*); the three Vice-Chancellors were appointed respectively in 1811 and 1842, and the Lords Justices in 1851. On account of his more ancient origin the Master of the Rolls ranked next to the Lord Chancellor in order of precedence. The ultimate Court of Appeal was, as at Common Law, the House of Lords.

Difference in relief at Law and in Equity.

The Courts of Law were governed by strict rules, but it was different with the Court of Chancery in its first origin. There originally justice was measured out according to the conscience of each particular Chancellor; but in course of time this ceased to be the case. Equity was modelled from time to time by various Judges, and legislative enactments, so that at the time of the Judicature Acts Courts of Equity were as much bound by legislative enactments and precedent decisions as were the Courts of Law.

Inconvenience of the two distinct systems of Law and Equity.

These two different systems of Law and Equity had therefore their origin naturally enough, but however satisfactory in explanation was their separate existence it could hardly be said to be so in practice, for in some cases a litigant ran the risk of applying for relief to the wrong Court, and thus failing, having to bear the

(*e*) Ante, p. 2.
(*f*) See Haynes' Outlines of Eq. pp. 50–54.

cost of his proceedings and commence over again in the other Court; in other matters the one Court could give a partial relief, and for complete relief the assistance of the other had also to be obtained, and there was besides a complete difference in the practice.

It will now be best to give shortly an outline of the former practice in the Courts of Common Law and the Court of Chancery respectively, so that the student may be able to compare some points of the old with the new practice given throughout this work, and thus see with greater force the nature and effect of the alterations.

Former Common Law practice. Writ.

The first step in an ordinary Common Law action was a writ of summons, being in its main particulars the same as a writ of summons under the present practice (*g*). This was served on the defendant, and on his failing to appear thereto within eight days judgment was signed, much the same as under the present practice. If he appeared the pleadings then commenced.

Declaration.

The first pleading in the action was a declaration, being a written statement of the plaintiff's case, couched in many particulars in technical language, and frequently in its technicalities involving considerable repetition and running on to considerable length. This was delivered to the defendant's solicitor—or attorney, as he was called at law—with a notice indorsed thereon requiring him to plead thereto within eight days.

Plea.

The next step was a plea by the defendant, being a written statement of his case, and, like a declaration, often very lengthy and very technical.

Replication.

The plaintiff then delivered a replication, which was

(*g*) As to which, see post, p. 29.

usually simply a joinder of issue, viz., a direct denial of the points urged by the defendant, and if this were so the pleadings were then ended, for the great object of pleadings was, and indeed still is, to arrive at a direct point in issue between the plaintiff and defendant. Sometimes, however, a direct issue could not be then arrived at, and it became necessary to have subsequent pleadings to attain that object, and these were called the rejoinder, the surrejoinder, the rebutter, the surrebutter, and if it were necessary to continue the pleadings after this they had no distinctive names. However, for them to go as far as this did not often occur; they usually terminated with the replication.

Rejoinder, surrejoinder, rebutter, and surrebutter

Issue having been joined the next step was notice of trial by the plaintiff.

Notice of trial.

The cause then came on to be heard in due course, the evidence at the trial being *vivâ voce*, and then followed verdict, judgment, and execution.

Verdict, judgment, and execution.

The first step in an ordinary Chancery suit was a bill of complaint, which was a printed (*h*) document containing a full and detailed statement of the plaintiff's case. This having been filed a sealed copy was served on the defendant, and he appeared thereto within eight days.

Former Chancery practice. Bill of complaint.

An almost invariable practice was then for the plaintiff to file interrogatories, being practically the bill of complaint put into the form of questions. To these interrogatories the defendant was bound to put in an answer which practically contained his defence. If the plaintiff did not deliver interrogatories it was

Interrogatories.

Answer.

(*h*) In some few cases where expedition was required a written bill could be filed, but a printed copy had to be filed afterwards within fourteen days.

open to the defendant to put in a voluntary answer, which was practically a voluntary defence. The bill, and answer (if any), or if none, the bill alone thus formed the pleadings in a Chancery suit.

Notice of motion for decree.

The most usual course (*i*) then to bring the cause to a hearing was for the plaintiff to give to the defendant notice of motion for decree, which was a notice that he intended to apply to the Court to give him the relief he considered himself entitled to. The evidence was not *vivâ voce*, as at Common Law, but by affidavits, the plaintiff first filing his affidavits in support, then the defendant his in answer thereto, and finally the plaintiff filing any further affidavits in reply on any new points appearing from the defendant's evidence. The cause was then set down and in due course came on to be heard.

Difference in the nature of the cases that usually came before Courts of Law and Equity respectively.

One of the great differences under the old system—and one which will hereafter be touched on under the present practice (*j*)—was the difference in the kind of case that usually came before the Court of Chancery and the Courts of Law. In a Court of Law the plaintiff almost invariably only sued to recover a sum of money, and on the hearing of the cause the whole matter could be disposed of by the verdict of the jury and the judgment founded thereon. But in Chancery this was usually different; there the plaintiff was frequently proceeding on matters of intricacy, and in almost all cases in matters which involved more than could be settled in open Court. For instance, in an administration suit, it would have been impossible for the whole matter at once to have been disposed of in open Court. It was necessarily impossible for the Court to then and there find out what the estate

(*i*) It is unnecessary to refer to the other courses.
(*j*) See post, p. 91.

consisted of, what were the debts, who the parties interested, and so on. So again, take a suit for dissolution of a partnership, and for the partnership accounts to be taken, how could the Court dispose of this at once? It was manifestly impossible. And this was so in the great majority of cases. This should be well noticed by the student, for though dwelt upon here primarily as explaining the former practice, it also explains the present; for there still exists a distinction between the majority of cases coming before the Chancery Division on the one hand, and the Queen's Bench, Common Pleas, and Exchequer Divisions on the other hand, as will be hereafter seen.

Decree.

At the hearing of the cause then, the Court being unable to dispose of the whole matter at that time, made a decree directing certain accounts and inquiries to be taken and made. Thus in an administration suit, amongst others, an account of the testator's personal estate, an account of his debts, an inquiry as to the persons beneficially interested &c.; or in a partnership suit, an account of the partnership assets, of the proportion in which each was entitled &c. The decree was then, after having been drawn up (*k*), carried into Chambers and worked out before the Judge's Chief Clerk (*l*), who finally made his certificate of the result of the accounts and inquiries referred to him. Then on this certificate the cause came before the Court again on what was called a hearing on further consideration, when the Court made its final decree, called an order on further consideration. This order usually brought the suit to a conclusion.

Chief Clerk's certificate.

Order on further consideration.

The following statement, in columns, contrasts at a

(*k*) As to the drawing up, which is the same now, see post 96.
(*l*) See post, p. 96.

glance the most usual points in the Common Law and Chancery procedure respectively :—

Common Law.	*Chancery.*
Writ of summons by plaintiff and service thereof.	Bill of complaint by plaintiff and service thereof.
Appearance by defendant.	Appearance by defendant.
Declaration by plaintiff.	Answer by defendant founded on interrogatories administered by plaintiff. If no interrogatories administered, no answer necessary; but a voluntary answer optional.
Plea by defendant.	
Replication by plaintiff.	
(Occasionally subsequent proceedings, being rejoinder by defendant, surrejoinder by plaintiff, rebutter by defendant, surrebutter by plaintiff, &c.)	
Notice of trial by plaintiff.	Notice of motion of decree by plaintiff, followed by affidavits by plaintiff, then by defendant in answer, and then by plaintiff in reply.
Entry of cause for trial.	Entry of cause for trial.
Cause heard by judge and jury, verdict, judgment, and execution.	Cause heard by judge, and decree made directing accounts and inquiries to be taken and made.
	Decree carried into Chambers, and summons taken out to proceed thereon.
	Evidence brought in before Chief Clerk on accounts and inquiries.
	Chief Clerk's certificate.
	Cause set down for hearing on further consideration.
	Hearing on further consideration, when final decree made disposing of the whole matter. (In many cases, however, the matter could not be finally disposed of even then, *e. g.*, if there were infants wards of Court, and then liberty was given to apply to Court at any time, and further consideration reserved.)

The foregoing is of course but an outline of the most usual former proceedings. The student must not imagine that the various things he reads of in the subsequent pages are necessarily new, as many of them are similar to the old practice. To detail further the former procedure would, in the Author's opinion, tend to lead the student into confusion.

Fusion.

The Judicature Acts are not the first steps that have been taken for the fusion of the two systems of Law and Equity. From time to time Acts have been passed giving to the Courts of Law certain powers before only exercised by Courts of Equity, and to the Court of Equity powers before only exercised by the Court of Law. The chief of these steps towards fusion may be here shortly noticed:—

Steps towards fusion prior to the Judicature Acts.

1. *Common Law Powers given to the Courts of Equity.*

By 14 & 15 Vict. c. 83, s. 8, they were enabled to obtain the assistance of a Common Law Judge instead of sending cases for the opinion of a Common Law Court.

By 21 & 22 Vict. c. 27, they might award damages either in addition to or in substitution for injunctions or specific performance.

By 25 & 26 Vict. c. 42, they might try questions of fact with or without a jury.

2. *Equity Powers given to the Courts of Common Law.*

By the Common Law Procedure Act, 1852 (*m*), they were enabled to grant relief in actions for non-payment of rent or mortgage money (*n*).

By the Common Law Procedure Act, 1854 (*o*), they

(*m*) 15 & 16 Vict. c. 76.
(*n*) Sect. 212.
(*o*) 17 & 18 Vict. c. 125.

might grant injunctions against the continuance of any injury (*p*), specific performance in certain limited cases (*q*), give discovery (*r*) and allow equitable defences to be set up (*s*).

By the same Act (*t*) they might order the specific delivery up of chattels wrongfully detained instead of giving defendant the option of retaining them on paying their value; and by the Mercantile Law Amendment Act, 1856 (*u*), they might do the same in actions for breach of contract to deliver goods.

By the Common Law Procedure Act, 1860 (*x*) they might grant relief against forfeiture of a lease for non-insurance (*y*).

Judicature Act, 1873.

And now the final step towards fusion has been taken by the Judicature Act, 1873, the object of that Act being to do away with separate Courts for different matters, and also the anomaly of the fact of the existence of two distinct tribunals, and to assimilate the whole practice as much as possible. The constitution of the Courts under that and the Judicature Act of 1875 will be found detailed in the next chapter.

(*p*) Sect. 79.
(*q*) Sect 68, and see on construction put on it, *Benson* v. *Paull*, 27 L. T. Rep. 78.
(*r*) Sect. 51.
(*s*) Sect. 83.
(*t*) Sect. 78.
(*u*) 19 & 20 Vict. c. 97, s. 2.
(*x*) 23 & 24 Vict. c. 126.
(*y*) Sect. 2.

CHAPTER II.

THE PRESENT COURTS.

The Supreme Court of Judicature.

By the Judicature Act, 1873, the former Courts, viz. (1) the Court of Chancery, (2) the Court of Queen's Bench, (3) the Court of Common Pleas, (4) the Court of Exchequer, (5) the Court of Admiralty, (6) the Court of Probate, and (7) the Divorce Court (*z*), are united and consolidated into one Court called the "Supreme Court of Judicature," which is divided out into two permanent divisions, viz., "Her Majesty's High Court of Justice" for original jurisdiction and certain appellate jurisdiction from Inferior Courts, and "Her Majesty's Courts of Appeal" for Appellate jurisdiction (*a*). The two Judicature Acts came into operation on the 1st of November, 1875 (*b*).

It is necessary that before proceeding to the present actual practice of the Courts, the student should have some idea of their constitution, and also of the Judges or officers who preside in them or assist in carrying out the details of practice.

Constitution of the High Court of Justice.

To deal firstly with the High Court of Justice. There are five divisions in this Court, corresponding with the previous Courts, which, as just stated, are united and consolidated into one, viz., (1) the Chancery Division,

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(*z*) No reference to the origin of or practice in these three last-mentioned Courts are made in this work, as being beyond it. Nor of course to the Court of Bankruptcy, which it may be noticed is *not* united in the Supreme Court, the provision to that effect in the Jud. Act, 1873, being repealed by the Jud. Act, 1875, s. 9.

(*a*) Jud. Act, 1873, ss. 3 and 4; Jud. Act, 1875, s. 9.

(*b*) Except as to House of Lords, as to which, see post, p. 19.

(2) the Queen's Bench Division, (3) the Common Pleas Division, (4) the Exchequer Division, and (5) the Probate, Divorce, and Admiralty Division (*c*). The previous Judges of the different Courts are Judges of the High Court (*d*), and generally sit in Divisions synonymous to the previous Courts; but this does not prevent any Judge from sitting when required in any divisional Court, and any Judge may be transferred from one Division to another by Her Majesty under her royal sign manual (*e*). The Judge who was chief of any formerly existing Court is now president of the analogous Division, viz., of (1) the Lord Chancellor; (2) the Lord Chief Justice of England; (3) the Lord Chief Justice of the Court of Common Pleas; (4) the Lord Chief Baron of the Exchequer, and of (5) the originally existing Judge of the Court of Probate was made President, but subject thereto the senior Judge of each division (*f*). When any vacant judgeships occur new Judges may be appointed by letters patent (*g*). The Judges (other than the Lord Chancellor) hold their offices for life subject to a power of removal by Her Majesty on an address presented by both Houses of Parliament (*h*).

Jurisdiction vested in the High Court.

As the various formerly existing Courts, except the Court of Bankruptcy, are consolidated into one, it follows that the High Court of Justice should have vested in it all their original jurisdiction, which is, indeed, specially provided; and it has also vested in it the jurisdiction of the Court of Common Pleas at Lancaster, the Court of Pleas at Durham, and the Court created by Commissions of Assize, Oyer, and Terminer, and of Gaol Delivery, and this is to include the jurisdiction vested in the Judges of the said Courts

(*c*) Jud. Act, 1873, s. 31, see note in Griffith and Loveland's Pr. p. 55.
(*d*) Jud. Act, 1873, s. 5.
(*e*) Jud. Act, 1873, s. 31.
(*f*) Ibid.
(*g*) Jud. Act, 1873, s. 5.
(*h*) Jud. Act, 1875, s. 5.

sitting in Court or Chambers, or elsewhere, in pursuance of any statute, law, or custom (*i*). But it is specially provided that there shall *not* be transferred to the said Court the jurisdiction of the Court of Appeal in Chancery, or of the same Court in Bankruptcy, the jurisdiction of the Court of Appeal in Chancery of the county palatine of Lancaster, the lunacy jurisdiction formerly vested in the Lord Chancellor and Lords Justices, the jurisdiction vested in the Lord Chancellor in relation to grants of letters patent, or as visitor of any college, and any jurisdiction of the Master of the Rolls in relation to records (*k*).

Distribution of business amongst the different Divisions.

With regard to the distribution of business amongst the different Divisions of the Court, generally the same matters as would have before been within the exclusive and peculiar jurisdiction of each different Court (*l*), are now within the exclusive and peculiar jurisdiction of the corresponding Division (*m*). Primarily the plaintiff is allowed an absolute choice of which Division he will commence his action in, but if he commence it in a Division to which it should not have been assigned, the Court may, on summary application, transfer it to the proper Division, or retain the same in the Division in which it is commenced; and an action must not be commenced in the Probate, Divorce, and Admiralty Division unless formerly it would have been commenced in one of those Courts (*n*).

District registries.

To facilitate the prosecution in country districts of certain proceedings in an action, provision has been made for the establishment throughout the country of district registries (*o*), where actions may be commenced

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(*i*) Jud. Act, 1873, s. 16, amended by Jud. Act, 1875, s. 9. See Griffith and Loveland's Pr. p. 13.
(*k*) Jud. Act, 1873, s. 17; Griffith and Loveland's Pr. p. 14.
(*l*) See ante, pp. 6, 7.
(*m*) Jud. Act, 1873, s. 34; Griffith and Loveland's Pr. p. 59.
(*n*) Jud. Act, 1875, s. 11.
(*o*) Jud. Act, 1873, s. 60, amended by Jud. Act, 1875, s. 13.

and continued down to and including final judgment (*p*).

Constitution of Her Majesty's Court of Appeal.

To deal secondly with Her Majesty's Court of Appeal. This Court is constituted by five *ex officio* Judges, viz., the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, and in addition so many ordinary Judges as Her Majesty shall from time to time appoint, such ordinary Judges being styled "Justices of Appeal" (*q*). The former Lords Justices of Appeal in Chancery were made Judges of this Court, which at the present time, in addition to the *ex officio* Judges, has six Judges. The Judges of the Court (except the Lord Chancellor) hold their offices on the same terms as the Judges of the High Court of Justice (*r*). In addition to the Judges mentioned, the Lord Chancellor has power to request the attendance of any Judge of any Division of the High Court, except during the time of the spring or summer circuits, as an additional Judge (*s*).

Jurisdiction vested in the Court of Appeal.

All the jurisdiction and powers formerly vested in any of the following Courts or persons are now vested in this Court of Appeal, viz.: (1.) In the Lord Chancellor and Court of Appeal in Chancery in the exercise of his and its appellate jurisdiction, and also as a Court of Bankruptcy Appeal. (2.) In the Court of Appeal in Chancery of the County Palatine of Lancaster, or of the Chancellor of the duchy and said county palatine. (3.) In the Lord Warden of the Stannaries, or in the Lord Warden sitting in his capacity of judge. (4.) In the Court of Exchequer Chamber; and (5) in Her

(*p*) As to the practice in district registries, see Jud. Act, 1875, Order xxxv. When an action may be removed from district registries, see post, pp. 65, 66.

(*q*) Jud. Act, 1875, s. 4, amended by 39 & 40 Vict. c. 59, ss. 15, 19.

(*r*) See ante, p. 12.

(*s*) Jud. Act, 1875, s. 4, amended by 39 & 40 Vict. c. 59, s. 19.

Majesty in Council, or the Judicial Committee of the Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order of lunacy made by the Lord Chancellor or any other person having jurisdiction in lunacy (*t*).

Sittings of the Court.

The sittings of the Court of Appeal, or in London or Middlesex of the High Court of Justice, are four in every year, viz.: (1.) The Michaelmas Sittings, to commence the 2nd of November and end the 21st of December; (2.) The Hilary Sittings, to commence the 11th of January and end on the Wednesday before Easter; (3.) The Easter Sittings, to commence on the Tuesday after Easter week and end on the Friday before Whit Sunday; and (4.) The Trinity Sittings, to commence on the Tuesday after Whitsun week and terminate on the 8th of August (*u*). These sittings are nearly synonymous with the formerly existing terms, which are abolished so far as they relate to the administration of justice (*x*).

Vacations.

The Vacations that now exist are four, viz.: the Long, Christmas, Easter, and Whitsun (*y*), of which the Long is the same as heretofore, viz.: commencing the 10th of August and terminating the 24th of October, and during this time no pleading can be amended or delivered unless directed by a Court or Judge, nor is the time of the Long Vacation reckoned in the time allowed for filing, amending, or delivering any pleading unless otherwise directed by a Court or Judge (*z*). Besides this, where the time limited for doing any act is less than six days, Sunday, Christmas Day, and Good Friday are not counted, and where the last day for doing any act which cannot be done when the offices are closed, expires on a Sunday or other day when they are closed, it is considered duly

(*t*) Jud. Act, 1873, s. 18, and see Griffith and Loveland's Pr. pp. 15, 16.
(*u*) Order LXI. to which reference can be made for further details.
(*x*) Jud. Act, 1873, s. 26.
(*y*) Ibid.
(*z*) Order LVII., rr. 4, 5.

done if done on the first day when the offices are open (*a*).

Circuits.

The powers of issuing commissions of assize are kept alive, subject to arrangements between the Judges of the High Court. The Judges of the Queen's Bench, Common Pleas, and Exchequer Divisions go circuit (*b*).

Officers of the Courts.

There are various officers of the Courts besides the Judges. In the Queen's Bench, Common Pleas, and Exchequer Divisions may be mentioned the Masters, the Associates, and the Sheriffs; and in the Chancery Division, the Chief Clerks, the Registrars, the Paymaster-General, the Record and Writ Clerks, the Examiner, the Taxing Masters, and the Conveyancing Counsel.

The Masters.

The Masters attend in Court during its sittings, also in Chambers to dispose of various matters of lesser importance and to tax costs, and to dispose of matters referred to them to be disposed of by the Judges, *e.g.*, actions involving questions of account. They also receive money paid into Court (*c*).

(*a*) Order LVII. rr. 2, 3.

(*b*) Jud. Act, 1873, ss. 29, 37.

(c) It has been specially provided that they shall have no jurisdiction in certain matters, viz. :—

All matters relating to criminal proceedings or to the liberty of the subject.

The removal of actions from one Division or Judge to another Division or Judge.

The settlement of issues, except by consent.

Discovery, whether of documents or otherwise, and inspection, except by consent.

Appeals from district registrars.

Interpleader, other than such matters arising in interpleader as relate to practice only, except by consent.

Prohibitions.

Injunctions and other orders under sub-section 8 of sect. 25 of the Act, or under Order LII., rr. 1, 2, and 3 respectively.

Awarding of costs other than costs of any proceeding before such Master.

Reviewing taxation of costs.

Charging orders on stocks, funds, annuities, or share of dividends, or annual produce thereof.

Acknowledgments of married women (Order LIV.).

The duties of the Associates are to enter causes for trial, give certificates for judgment, in pursuance of the Judge's directions, and other like matters. The Associates.

The duties of the Sheriffs are to carry out the judgment of the Court by enforcing the various writs of execution delivered to them. The Sheriffs.

The duties of the Chief Clerks are to attend in the chambers of the various Judges of the Chancery Division to whom they are attached and to take accounts and inquiries, with the assistance of junior clerks under them, and also to dispose of various interlocutory applications arising in the course of actions. The Chief Clerks.

The duties of the Registrars are to enter causes for trial, to attend in Court and take minutes of the decisions given, and afterwards to draw the same up in proper form and settle them in the presence of the different parties or their solicitors. The Registrars.

The duties of the Paymaster-General are to keep the books in Chancery containing suitors' accounts of money paid into and out of Court, and draw cheques for suitors, and make investments in and bespeak sales of stock, according to the Court's orders. The Paymaster-General

The duties of the Record and Writ Clerks are to receive all proceedings, affidavits &c. filed in the course of Chancery proceedings, to seal writs, and furnish office copies of affidavits &c. when required. The Record and Writ Clerks.

The duty of the Examiner is to preside at the examination of witnesses, in some cases. The Examiners.

The duties of the Taxing Masters are to tax solicitors' costs. The Taxing-Masters.

The Conveyancing Counsel are certain counsel appointed to assist the Court in matters of conveyancing; The Conveyancing Counsel.

thus if property the subject-matter of Chancery proceedings is about to be sold, the matter will be referred to one of these officers to investigate the title and prepare the conditions of sale.

Solicitors.

Solicitors are also to a certain extent officers of the Court.

Referees and Assessors.

In addition to the foregoing, certain new officers have been appointed by the Judicature Act, 1873, viz., Referees and Assessors. Referees are persons to whom any matter is referred by the Court, and they may be either official referees, that is permanent referees to whom any matters may be referred, or special referees, that is persons specially chosen for the one particular case. Assessors are persons having peculiar or special knowledge in any matter before the Court, and called in to assist the Court in such matter. Subject to any right to have particular cases submitted to a jury, questions may be referred for *inquiry and report* to any official or special referee, and the Court may adopt such report, and if so adopted it may be enforced as the judgment of the Court. The Court may also in cases which cannot conveniently be tried by a jury order any question or issue of fact or any question of account arising therein to be tried before a referee (*d*). Any matters referred to the official referees (there are at present four of them) are distributed amongst them in rotation. A referee may hold the trial at or adjourn it to any place he may deem most convenient, have any inspection or view, and shall, unless otherwise directed by the Court or a Judge, proceed with the trial *de die in diem* in a similar manner as in an action tried before a jury. Subject to any order, evidence is to be taken before him and the attendance of witnesses enforced by subpœna, and the trial is to be generally conducted as nearly as circumstances will admit as

(*d*) *Pontifex* v. *Severn*, 26 W. R. 183.

trials before a Judge of the High Court, but not so as to make the tribunal of the referee a public court of justice (*e*). A referee also has no power of committing to prison or of enforcing any order by attachment or otherwise (*f*).

House of Lords.

Finally, we should notice the ultimate Court of Appeal, viz., the House of Lords, and to deal with this in its origin requires us to go back to very ancient times. It would appear that in the earliest times the House of Lords was possessed of both an original and an appellate jurisdiction in Common Law matters, both of which fell into disuse; and it seems that the House of Lords had not then any jurisdiction in appeal from Chancery. About the time of the Restoration an attempt was made by the Lords to regain both the former jurisdictions, which, though unsuccessful with regard to its original was successful with regard to its appellate jurisdiction; and at about the same time an appeal in Chancery matters was usurped, and after a struggle successfully so, and the jurisdiction of the House of Lords as an ultimate Court of Appeal has not since been questioned (*g*).

Origin of its jurisdiction as a Court of Appeal.

The constitution of the House of Lords as a Court of Appeal.

But the constitution of the House of Lords as an ultimate appellate Court has in modern times been found not to be altogether satisfactory (*h*), and consequently, by the Judicature Act, 1873 (*i*), it was proposed to abolish its jurisdiction. This provision was, however, first suspended in its operation (*j*), and then

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(*e*) Jud. Act, 1873, ss. 56–59, 83; Order XXXVI. rr. 28–34.

(*f*) Order XXXVI. r. 33.

(*g*) See Brown's Law Dict. pp. 178, 179, tit. 'House of Lords, Jurisdiction of;' Haynes' Outlines of Equity, pp. 62–66. See also the judicial powers of the Lords historically traced in Hallam's History of England, vol. iii., p. 17 *et seq.*

(*h*) See it instanced in Chancery matters (to which the above remark particularly applies), Haynes' Outlines of Equity, p. 65.

(*i*) Sect. 20.

(*j*) Jud. Act, 1875, s. 2.

Appellate Jurisdiction Act, 1876.

was passed the Appellate Jurisdiction Act, 1876 (*k*), which repeals the former provision, and perpetuates the House of Lords as the ultimate Appellate Court on an improved constitution. By it provision is made for the appointment of two Lords of Appeal in ordinary for the House of Lords (*l*), and it is enacted that no appeal shall be heard and determined there unless there are present not less than three Lords of Appeal, to consist of the following persons: (1), the Lord Chancellor for the time being, (2), the Lords of Appeal in Ordinary, and (3), such Peers of Parliament as are for the time being holding or have held any high judicial offices (*m*). The Act also provides that appeals may be heard and determined notwithstanding Parliament may not be then sitting.

This must conclude our remarks on the Courts; and in next proceeding to the practice in them, we would only remind the student of what has already been already once stated, viz., that the practice, though for the main part regulated by the Judicature Acts and the rules thereunder, yet is not entirely so, the Act of 1873 (*n*) providing that where no special provision is made, the practice of the Courts is to be as nearly in the same manner as it might have been exercised previously by the Courts from which the jurisdiction was transferred (*o*).

(*k*) 39 & 40 Vict. c. 59.

(*l*) Sect. 6.

(*m*) Sect. 5. 'High Judicial office,' means any of the following offices, viz.: The Office of Lord Chancellor of Great Britain or Ireland, or of paid Judge of the Judicial Committee of the Privy Council, or of Judge of one of Her Majesty's Superior Courts of Great Britain and Ireland, sect. 25.

(*n*) Sect. 23.

(*o*) Generally on any points occurring in this chapter as to which the student may require further information or explanation he is referred to Griffith and Loveland's Practice.

CHAPTER III.

PARTIES TO ACTIONS AND JOINDER OF CAUSES OF ACTION.

BEFORE commencing any action in the High Court it is very important to consider carefully who are the necessary parties to any such action, both in the capacity of plaintiffs and defendants, and how such parties should sue and be sued, and also any preliminary formalities that may, under certain circumstances, have to be observed.

Non-joinder of plaintiffs or defendants.

In the first place a right may be vested in several persons jointly, and if so they must sue together; or again, certain persons may be liable only jointly, and if so they must be sued together. The non-joinder, however, of either plaintiffs or defendants is not in any way fatal to the action. In the event of non-joinder of persons who should have been joined in the action as co-plaintiffs, the Court, if satisfied that the non-joinder was through mistake, and that it is necessary to do so, may order any person or persons to be added as plaintiffs on such terms as may seem just, his or their consent being given thereto (*p*). The non-joinder of defendants may also equally be rectified, for they may be joined by leave of the Court or a Judge (*q*). In this latter case the course of practice is for the plaintiff to file an amended copy of and sue out a writ of summons and serve such new defendant therewith, and any statement

(*p*) Order XVI. rr. 2, 13.
(*q*) Ibid. r. 13.

of claim which has been delivered is also amended and served (*r*).

Misjoinder of plaintiffs or defendants.

In the next place it may happen that a person is sometimes, through mistake, wrongly joined as a plaintiff or wrongly made a defendant; but the misjoinder of either plaintiff or defendant is not in any way fatal to the action. In the event of misjoinder of persons as plaintiffs or defendants judgment may be given for or against such one or more as may be found entitled or found liable without any amendment; and generally no action is defeated by any misjoinder, but a defendant is entitled to any extra costs occasioned thereby (*s*). The Court or a Judge also if satisfied that a person wrongly made plaintiff has been so made by mistake may order any other person or persons to be substituted (*t*).

Substitution of plaintiff.

Interest of defendants, &c.

It is not at all necessary that the defendants to an action should all be interested to the same extent, but the Court or a Judge may make such order as may appear just to prevent any defendant being embarrassed or put to expense when he may have no interest (*u*). A plaintiff is able if several persons are liable on a contract to join them all in the same action (*x*); and if he is doubtful, whether in contract or otherwise, against which of two or more persons he can sustain a claim, he may join them all in one action, to the intent that the question as to which is liable and to what extent may be determined (*y*).

Parties represented by trustees.

Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property

(*r*) Order XVI. rr. 15, 16.
(*s*) Ibid. rr. 3, 13.
(*t*) Ibid. r. 2. On the subject of non-joinder and misjoinder, see further, Griffith and Loveland's Pr. pp. 222–250.
(*u*) Ibid. r. 4.
(*x*) Ibid. r. 5.
(*y*) Ibid. r. 6.

or estate of which they are trustees or representatives without joining any of the parties beneficially interested in the trust or estate, and they are considered as representing such parties in the action; but any such persons may, at any stage of the proceedings, be added as parties thereto (*z*).

Several parties with same interest.

Where there are numerous parties having the same interest, any one of such persons may sue, or be sued, or be authorized by the Court to defend such action on behalf of the others (*a*); and where in any case there may be a doubt on some construction who may be entitled as heir-at-law or next of kin, some person may be appointed by the Court to represent such person or persons (*b*).

Parties joined in consequence of defence.

It sometimes happens that when a defendant's defence is put in it is found to contain some counter-claim which raises questions not only between the plaintiff and defendant but also between third persons not parties to the action. In such a case the proper course is for the defendant in his defence to add a further title similar to the title in a statement of complaint, setting forth the names of all such persons, and to deliver his defence to them within the time which he is required to deliver it to the plaintiff, and the action then proceeds against them in exactly the same way as if they had been made parties thereto (*c*).

Contribution against a person not a party.

Again, it may happen that a person who is being sued claims, in the event of a judgment being recovered against him, contribution from some third person not a party to the action. To prevent such third person afterwards contesting the validity of the judgment that may be obtained against him, the defendant may adopt a course that will bind him with it just as much

(*z*) Order XVI. r. 7.
(*a*) Ibid. r. 9.
(*b*) Ibid. r. 9*a*.
(*c*) Order XXII. rr. 5–9, and Order XXIX. r. 13.

as if he had been a party. This course is as follows: the defendant, within the time for delivering his statement of defence, serves such third person with a notice of his claim stamped with the seal of the Court, together with a statement of the plaintiff's claim, or if there is not one, then with a copy of the writ in the action. If the third person desires to dispute al liability he can enter an appearance within eight days from the service of the notice, or after that time may be allowed to appear by the Court or a Judge. After his appearance, the party giving the notice applies to the Court or a Judge for directions as to the mode of determining the question in the action, and leave to such third person to defend may be given on such terms as may seem just, and generally all proper directions may be given. If the third person, after being served as above stated, does not appear the effect is simply this: not that the plaintiff or defendant can get any judgment against him, but that in any proceedings to recover contribution that may subsequently be taken against him by the defendant, he is deemed to have admitted the validity of the judgment that may have been obtained against the defendant in the action, whether obtained by consent or otherwise (*d*).

Death, &c., of parties.

If in the course of an action one of the parties dies or becomes bankrupt, or a female party marries, or if in any way any devolution of estate of any party to the action occurs by operation of law, the action does not abate, but an order may be made for the personal representative, trustee, husband, or other successor in interest (if any) to be made a party to the action or to be served with notice thereof, and such order as may be just may be made for disposal of the action (*e*).

Limiting several causes of action.

Different causes of action may be joined in the same action in most cases, but if it appears to the Court or a

(*d*) Order XVI. rr. 17–21; Griffith and Loveland's Pr. pp. 244–250.
(*e*) Order L. rr. 1, 2.

Judge that they cannot be conveniently tried together, separate trials may be ordered, and any defendant may apply alleging that such causes of action cannot be conveniently disposed of together, and the Court or a Judge may order any such causes to be excluded (*f*). Except, however, by special leave an action for recovery of land cannot be joined with any other cause of action except in respect of mesne profits, or arrears of rent, or damages for breach of any contract under which the same or any part thereof is held (*g*); nor, except by like leave, can claims by a trustee in bankruptcy as such be joined with any other claim by him in any other capacity (*h*). Claims by or against an executor or administrator as such may only be joined with claims by or against him personally when such last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (*i*).

Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendants (*k*).

Persons not *sui juris* suing or being sued.

Infants must sue by a next friend and defend by guardian *ad litem*. Married women usually sue and defend together with their husbands, but if not, then they sue in the same manner as infants, but the Court or a Judge may authorize them to sue or defend by themselves on giving such security (if any) for costs as the Court or a Judge may require. Except, however, by leave of the Court whenever a married woman is sued her husband must be joined as a defendant with her (*l*). Lunatics and persons of

(*f*) Order XVII. rr. 1, 8, 9.
(*g*) Ibid. r. 2.
(*h*) Ibid. r. 3.
(*i*) Ibid. r. 5.
(*k*) Ibid. r. 6.
(*l*) Ibid. XVI., r. 8; Griffith and Loveland's Pr. pp. 229.

unsound mind sue by their committees or next friend and defend by their committees or guardians appointed for that purpose (*m*). In practice a next friend or guardian *ad litem* is usually some person closely connected with the plaintiff or defendant, but there is no rule that this must be so. The next friend of a plaintiff is liable for the due prosecution of the action and for the costs of it, and he therefore has to sign a consent expressing his willingness to act as next friend, which consent is filed with the writ. The guardian of a defendant incurs no such liability for costs; he is appointed as a matter of course on a petition supported by affidavit of his fitness and of his having no interest adverse to the party.

Corporations, companies, &c.

Corporations sue and are sued in their corporate names, and the solicitor by whom they defend should be appointed under their common seal. Railway companies and joint stock companies also sue and are sued in their corporate names. Certain banking and other companies however, by virtue of various statutes, sue and are sued in the name of one of their public officers (*n*).

Matters of a public nature.

Actions comprising matters of a public nature must be commenced in the name of the Attorney-General; the person at whose instance they are commenced, and who for all practical purposes is the plaintiff, being called the relator.

Notice before action.

Although it is usual in practice to give notice to a defendant before bringing an action against him, it is not generally necessary. The chief case in which notice before action must be given is in an action against a justice of the peace for anything done by him in the execution of his duty. A month's notice

(*m*) Order XVIII.
(*n*) See hereon Chitty's Arch. Pr. 12th Ed. pp. 1145, 1184.

prior to the action being commenced must here be given (*o*). Also when any action is intended to be brought against a constable who has acted under a warrant, demand in writing must be made of the perusal and copy of the warrant six days before commencing an action against him. If this is granted within that time, the justice who granted the warrant must be joined as a co-defendant, and then the mere production of the warrant at the trial will entitle the constable to a verdict, though if the justice had no jurisdiction the plaintiff will recover against him; if not granted within the six days the action may then be commenced against the constable alone (*p*).

(*o*) Chitty's Arch. Pr. 12th Ed. p. 1272.
(*p*) Ib. pp. 1275–1278.

PART II.

OF THE PRACTICE AS SPECIALLY OCCURRING IN THE QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER DIVISIONS.

CHAPTER I.

PROCEEDINGS TO APPEARANCE.

An action.

Writ of summons.

Indorsements.

PROCEEDINGS are commenced by an action, which is defined as the means of recovering in a Court of Justice what is due or owing to oneself (*a*). The first step in an action is a writ of summons (*b*), which may be issued in London or (except in Probate cases) in a district registry (*c*). It is written or printed, or partly written and partly printed (*d*). This writ is tested in the name of the Lord Chancellor; or if that office is vacant, in the name of the Lord Chief Justice of England (*e*), and specifies the Division to which it is intended that the action should be assigned, states the plaintiff's and defendant's names, and summonses the defendant to appear. It is indorsed with short particulars of the plaintiff's claim, so as to shew the defendant at once generally the nature of the demand made against him, and in proper cases with the special indorsement presently mentioned. The name and address of the solicitor issuing the writ must also be indorsed, and if he is an agent, then the two names, and if the plaintiff sues in person, then his name and address. There must also

(*a*) Brown's Law Dictionary, p. 11, tit. 'Action.'
(*b*) Order II. r. 1.
(*c*) Order V. r. 1.
(*d*) Ibid. r. 6.
(*e*) Order II. r. 8.

be indorsed an address for service, which if the writ is issued from London must be within three miles of Temple Bar, and if from a district registry, within the jurisdiction of such registry ; and if defendant does not reside within the registry, then in addition an address within three miles of Temple Bar (*f*). If the writ is specially indorsed, as mentioned in the next paragraph, the amount claimed for debt and costs respectively must be indorsed, and also a notice that upon payment thereof within four days after the service (or in the case of a writ not for service within the jurisdiction within the time allowed for appearance), further proceedings will be stayed. If defendant does so pay, he is nevertheless entitled to have the costs he pays taxed, and if more than one-sixth is disallowed, the plaintiff's solicitor pays the costs of taxation (*g*). However, this would but rarely occur, as there is a recognised amount for costs indorsed on writs, viz., £2 10*s*. After service the person serving the writ should within three days indorse on it the day of the month and week of the service thereof, otherwise the plaintiff cannot, on non-appearance of the defendant, proceed to judgment by default as detailed in the next chapter, as every affidavit of service of the writ must mention the day on which this indorsement was made (*h*). This, however, only applies where personal service has been effected, and not to a case of substituted service, in which case no such indorsement is necessary (*i*).

Special indorsement.

If the plaintiff seeks merely to recover a debt or liquidated demand in money payable under any contract, or a fixed sum payable under any statute, the writ may be specially indorsed with the particulars of the amount sought to be recovered after giving credit for any payment or set-off. The advantages of this

(*f*) Order IV.
(*g*) Order III. r. 7.
(*h*) Order IX. r. 13.
(*i*) Griffith and Loveland's Pr. p. 191.

special indorsement are two, viz. (1), that if the defendant does not appear within the proper time, the plaintiff may at once sign final judgment and issue execution; and (2) that even if he does appear, an application for leave to sign judgment, notwithstanding the appearance, may be made under Order XIV. These points will be further noticed in the next chapter.

Service of writ.

The writ having been issued, the next step is to effect service of it. In some cases the defendant's solicitor will accept service and undertake to appear, and if having done this he does not then appear he is liable to attachment (*k*), but more usually actual service has to be effected. When practicable this service is personal, by delivering to the defendant a copy of the writ, and at the same time producing to him the original (*l*); but if it is made to appear to the Court or a Judge that this personal service cannot be promptly effected, an order for substituted or other service may be made (*m*), *e. g.*, on some person connected with defendant, or by advertisement, &c. (*n*).

Service on particular persons.

When husband and wife are both defendants, it is sufficient to serve the husband, but the Court may order that the wife shall be served with or without service on the husband (*o*). Where the defendant is an infant, the writ is served on his father or guardian, or if none, on the person with whom or under whose care he resides, unless otherwise ordered; but service on the infant may be ordered to be good service (*p*). Where the defendant is a lunatic or person

(*k*) Order XII. r. 14.
(*l*) Strictly speaking the original need not be produced unless asked for by defendant. The practice is invariably as above stated.
(*m*) Order IX. r. 2.
(*n*) See remarks hereon in Griffith and Loveland's Pr. pp. 182–187.
(*o*) Order IX. r. 3.
(*p*) Ibid. r. 4.

of unsound mind, the writ is served on his committee or person with whom he resides, or under whose care he is, unless otherwise ordered (*q*). If the defendant is a corporation aggregate, the writ is served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary (*r*). Railway and other similar companies may be served by the writ being left at or transmitted through the post directed to the principal officer, or one of the principal officers, or by being given personally to the secretary, or, if no secretary, to a director of the company (*s*).

On partners.

A new provision as to the suing and service of partners calls for special notice. The old practice was, that on suing a partnership firm the plaintiff must find out who were the members of the firm, and name them and serve them individually as defendants, in the same way that when partners were suing they had to be individually named. Now partners may not only sue but may be sued in the name of their partnership firm (*t*), and service effected upon any one or more of them, or at their principal place of business within the jurisdiction, upon any person having at the time of the service the control or management of the business there (*u*); and so also when any one person carries on business in the name of a firm apparently consisting of more than one person, and is sued in the name of such apparent firm, the writ may be served in the same way upon any person having at the time of the service the control or management of the business there (*x*).

Where a writ is issued in which the plaintiff or plaintiffs is or are suing under a firm name, the

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(*q*) Order IX. r. 5.
(*r*) Chitty's Arch. Pr. 12th Ed. p. 199.
(*s*) 8 & 9 Vict. c. 16, s. 132.
(*t*) Order XVI. r. 10.
(*u*) Order IX. r. 6.
(*x*) Ibid. r. 6*a*. As to appearance of partners so sued, see post, p. 36; and as to execution when writ issued in this way, see post, pp. 85, 86.

defendant may demand the names and places of residence of the person or persons constituting the firm, and all proceedings may, on application, be stayed till furnished; or application may be made by summons to a Judge for a statement of the name of such persons to be verified on oath or otherwise as the Court shall direct (*y*).

In case of vacant possession.

In the case of an action to recover land, if the possession is vacant and service cannot be effected otherwise, it may be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property (*z*).

When defendant out of jurisdiction.

When a defendant is residing out of the jurisdiction no writ of summons can be issued against him without leave of the Court or a Judge (*a*). Every application for such leave must be supported by an affidavit shewing that the whole or part of the subject-matter of the action is property within the jurisdiction, or that some act, deed, will, or thing affecting such property, or a contract sought to be enforced, rescinded, dissolved, annulled, or otherwise affected, or for the breach whereof damages or other relief are or is demanded, was made or entered into within the jurisdiction, or that there has been a breach within the jurisdiction of any contract wherever made, or that some act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction. Also the amount or value of the property in dispute or sought to be recovered must be shewn; and if the defendant is resident in Scotland or Ireland, whether there is any local Court of limited jurisdiction having jurisdiction in the matter in question, and the com-

(*y*) Order VII. r. 2, and Order XVI. r. 10.
(*z*) Order IX. r. 8.
(*a*) Order II. r. 4.

parative cost and convenience of proceeding in England or in the place of such defendant's residence. The affidavit must always shew where the defendant may probably be found, and whether he is a British subject or not (*b*). If the defendant is not a British subject notice of the writ is served instead of a copy (*c*). Neither a Master nor a District Registrar can give leave for service of a writ or notice out of the jurisdiction (*d*).

When service may be effected.

How long writ in force.

Service may be made at any hour of the day or night, and on any day not being a Sunday or *dies non*, such as Christmas Day or Good Friday (*e*); a writ, however, only remains in force for twelve months; but where it has not been served it may, by leave, be renewed for six months, and so on from time to time, on satisfying the Judge or Registrar that reasonable efforts have been made to serve it, or for other good reason. This renewal is effected by the writ being marked at the proper office with a seal bearing the date of renewal (*f*).

Concurrent writs.

Concurrent writs are sometimes issued (*g*). They are simply duplicate originals, and would only be issued for the sake of expedition, *e. g.*, where there are several defendants residing at different places (as each is entitled, as before mentioned (*h*), to see the original on service), or where it is doubtful where a defendant is residing or is to be found.

Amendment of writ.

The Court or a Judge may, at any stage of the proceedings, allow the plaintiff to amend his writ of

(*b*) Order XI.
(*c*) Griffith and Loveland's Pr. p. 159.
(*d*) Order LIV. r. 2*a*.
(*e*) Griffith and Loveland's Pr. pp. 184, 185.
(*f*) Order VIII. The only apparent use in renewing a writ instead of issuing a fresh one is where the debt would, but for the process, be barred by the Statute of Limitations.
(*g*) Order VI.
(*h*) Ante, p. 31; and note (*l*).

summons in such manner and on such terms as may seem just (*i*).

Service having been effected, the next step in the action is for the defendant to appear to the writ, which appearance should be entered within eight days from service, inclusive of day of service (*k*), except in the case of writs issued under the Bills of Exchange Act, as presently mentioned; and in the case of writs issued against a defendant out of the jurisdiction, when the time is fixed by the Court or a Judge on the leave being granted to issue the writ, and varies according to the distance of defendant from England (*l*). The appearance is the mode of the defendant bringing himself before the Court, and it simply consists in the defendant in person, or by his solicitor, giving in at the proper office a memorandum, bearing the proper Court stamp, and signifying that he appears, and which memorandum, if the appearance is entered by a solicitor, must contain his place of business; and if entered in London, an address for service not more than three miles from Temple Bar; and if entered in a district registry, an address for service within the district (*m*). If the writ is issued in London the appearance must be in London also; if it is issued from a district registry, then, if the defendant resides or carries on business within the district, he must appear there, but if it is issued in the district and he does not so reside or carry on business, he can appear either in London or in the district registry (*n*). The defendant should, as before stated, appear within the eight days, for in default thereof the plaintiff may proceed to judgment, as mentioned in the next chapter; but if he does not he may still appear if the plaintiff has not yet signed judgment. It is customary

Appearance.

Time for.

What it is, and how entered.

When notice of appearance necessary.

(*i*) Order XXVII. r. 11.
(*k*) See form of writ in Appendix A. to Jud. Act, 1875, Part I.
(*l*) Order XI. r. 4.
(*m*) Order XII. r. 8.
(*n*) Order XII. rr. 1–3.

for the defendant on appearing to give notice thereof to the plaintiff, but this is not necessary unless he has either appeared elsewhere than where the writ was issued or after the proper time for appearance; in either of which cases he must, on the day of appearing, give notice to the plaintiff's solicitor—or if the plaintiff is suing in person, to the plaintiff himself—of the fact of his appearance (*o*). The plaintiff or his solicitor can always ascertain for himself whether or not the defendant has appeared by making a search for appearance at the proper office.

Appearance by partners sued in firm's name.

When partners are sued in their firm's name, or where any person carrying on business in the name of a firm is sued in the firm name (*p*), the appearance must be in the individual names or name, but all subsequent proceedings continue in the name of the firm (*q*).

Appearance by person not named in writ in action to recover land.

Any person not named as a defendant in a writ of summons for the recovery of land, may by leave of the Court or a Judge appear and defend on filing an affidavit shewing that he is in possession of the land by himself or his tenant (*r*). If a defendant in appearing to such an action only claims a title to some portion of the lands which are sought to be recovered, he may, in his appearance, or in a notice to be served within four days after appearance, limit his defence to the part in respect of which he desires to defend (*s*).

Demand on solicitor as to issuing of writ.

Any defendant who has appeared to a writ of summons is entitled to demand from the solicitor whose name appears as issuing the writ, whether or not it has

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(*o*) Order XII., rr. 6, 15.
(*p*) See ante, p. 32.
(*q*) Order XII. rr. 12, 12*a*. As to execution where defendants are sued in this way, see post, pp. 85, 86.
(*r*) Order XII. r. 18.
(*s*) Ibid. r. 21.

been issued by his authority, and if he answers in the negative, all further proceedings are to be stayed (*t*).

Proceedings under Bills of Exchange Act, 1855.

Reference has already been made incidentally to proceedings under the Bills of Exchange Act (*u*), which proceedings continue as heretofore (*x*). Under that Act, when a bill of exchange or promissory note (which words include cheques) is not more than six months overdue, a writ may be issued, the time to appear to which is twelve days, and which writ must be personally served on the defendant, who cannot appear thereto as a matter of right, but only by obtaining leave from a Judge within the twelve days to do so, which leave will be granted on his paying into Court the sum indorsed upon the writ, or satisfying the Judge by affidavit that he has some good defence. This leave may be granted on such terms as to security or otherwise as to the Judge may seem fit (*y*). If the defendant does obtain leave and duly appears, the proceedings go on as in other actions (*z*).

New practice provisions do not apply to writs under Bills of Exchange Act.

In considering proceedings under the Bills of Exchange Act, the student should remember that it is provided now (*a*) simply that the procedure under such Act "shall continue to be used," and it has therefore been held that where procedure has been commenced under that Act, the old practice under it must be strictly followed, so that the plaintiff cannot sign judgment in default of appearance without filing an affidavit of personal service, nor take advantage of the new provisions as to the suing of partners (*b*). It has, however, been held that a writ under this Act may be issued out of a district registry (*c*).

(*t*) Order VII. r. 1.
(*u*) 18 & 19 Vict. c. 67.
(*x*) Order II. r. 6.
(*y*) 18 & 19 Vict. c. 67, s. 2.
(*z*) See hereon also post, pp. 45–90..
(*a*) Order II. r. 6.
(*b*) See ante, p. 32.
(*c*) Griffith and Loveland's Pr. p. 163.

The defendant having appeared, the pleadings now commence, but prior to considering them the subject of judgment by default of appearance, and applications under Order XIV., must be considered, which is done in the next chapter (*d*).

(*d*) At the commencement of this chapter it was stated that proceedings are commenced by an action, which is strictly correct; but it is advisable here to notice the process of replevin, in which certain steps are taken prior to the action—the subject not being of sufficient importance to justify separate notice in a work like the present. Replevin is the redelivery of goods wrongfully taken from a person, occurring usually in cases of wrongful distress. The *modus operandi* is for the person whose goods are wrongfully taken to apply in the first instance to the Registrar of the District County Court, and before him enter in a bond with sureties, which is called the replevin bond. If the person desires to commence his action in the High Court, the conditions of the bond are to commence the action within one week, and to prosecute the same with due effect, to prove before the Court that he had good ground for believing either that some question of title was involved, or that the rent or damage exceeded £20, and to return the goods if their return is ordered. If, however, the action is to be commenced in the County Court, the conditions of the bond are only to commence the action within one month, and to prosecute the same with due effect, and to return the goods if their return is ordered. On the bond being given the goods are returned to the person giving it (called the replevisor), and he commences the action, so that the defendant in the action is to a certain extent in the position of a plaintiff in an ordinary action (17 & 18 Vict. c. 125, ss. 22–24; 19 & 20 Vict. c. 108).

CHAPTER II.

JUDGMENT IN DEFAULT OF APPEARANCE, AND APPLICATIONS UNDER ORDER XIV.

THE writ of summons, as has been stated in the last chapter, requires the defendant to enter an appearance within eight days from service. If the defendant does not obey this by appearing, the plaintiff's next step is to proceed on his default, but the course he can take differs according to the nature of the writ issued, and therefore each must be considered separately.

Non-appearance to specially indorsed writ.

Firstly, the writ may have been specially indorsed (*e*). In this case, if the defendant does not appear within the eight days, the plaintiff may file an affidavit of service, and of the indorsement of the fact of the service on the writ within three days afterwards, and of the non-appearance of the defendant, and on this he may at once sign final judgment and issue execution; if there are several defendants, and some one or more only do not appear, he may sign final judgment and issue execution against the defendant or defendants not appearing, and proceed with his action against the other or others appearing. This judgment may be for any sum not exceeding the sum indorsed on the writ, with interest at the rate specified (if any) to the date of the judgment, and an amount for costs (*f*). The proper amount for costs, if the case is a town one, is £3. 14*s.*; and if a country or agency case, £4. 6*s.*

Costs.

(*e*) See ante, p. 30.
(*f*) Order XIII. rr. 3, 4.

Under the Bills of Exchange Act.

Under the Bills of Exchange Act the rule is the same; if the defendant does not get the necessary leave to appear (*g*) within the twelve days, the plaintiff may, on a like affidavit, sign final judgment and issue execution.

Final and interlocutory judgment.

By a final judgment is meant one which is complete, and requiring no further act to be done to perfect it; an interlocutory judgment is one requiring something further.

Judgment by default in district registry.

When a defendant fails to appear to a writ issued out of a district registry, and he had the option of appearing there or in London (*h*), judgment by default of appearance cannot be entered until after such time as a letter posted in London on the previous evening, in due time for delivery to him on the following morning, ought in due course of post to have reached him (*i*).

Non-appearance when writ for a fixed sum, but not specially indorsed.

Secondly.—The writ may have been for a debt or liquidated demand but yet not indorsed with the particulars that constitute a special indorsement. In this case, on non-appearance within the eight days, the plaintiff must file the like affidavit of service, and in addition a statement of the particulars of his claim, so as thereby to supply the information that might have been given by a special indorsement, and then after waiting eight further days he may sign final judgment and issue execution (*k*).

Non-appearance in actions for unliquidated damages.

Thirdly.—The writ may be not for a debt or liquidated demand but for a detention of goods and pecuniary damages or either of them. Here, on non-appearance within the eight days, the plaintiff may, on

(*g*) See ante, p. 37.
(*h*) See ante, p. 35.
(*i*) Order XIII. r. 5*a*.
(*k*) Ibid. 13, r. 5.

affidavit of service and non-appearance, at once sign interlocutory judgment and then issue a writ of inquiry with a view to final judgment; or the Court or a Judge may order that instead of a writ of inquiry the damages shall be ascertained in any way in which any question arising in an action may be tried (*l*), *e.g.*, by referring the matter to one of the Masters.

Writ of inquiry.

A writ of inquiry is a writ issued to a sheriff commanding him to summon a jury and assess the amount of the damages. The under-sheriff usually presides at the assessment, and after the verdict is given the sheriff's return to the writ is made, and after four days final judgment may be signed, unless the officer who presided certify that in his opinion judgment ought not to be entered until the defendant has had an opportunity to apply to the Court to set the finding aside and grant a new writ of inquiry (*m*). An instance of a case for a writ of inquiry would be if a defendant in a breach of promise case or in any action of tort could not deny the promise or the doing of the tort, but yet wished to be heard on the question of the amount of damages to be awarded. His best course would be not to appear to the writ in the first instance, but let the plaintiff sign interlocutory judgment in default of appearance, and then appear and be represented on the assessment of damages.

Non-appearance in action to recover land.

Fourthly.—The writ may be for the recovery of land. Here if the defendant does not appear within the eight days, or appearing limits his defence to part only of the land (*n*), the plaintiff on affidavit, as in the other cases, may sign judgment for the land or the part thereof to which the defence does not apply (*o*); and where the plaintiff has in addition indorsed a claim for

(*l*) Order XIII. r. 6. For different ways in which an action can be tried, see post, p. 70.
(*m*) 1 Wm. 4, c. 7, s. 1.
(*n*) See ante, p. 36.
(*o*) Order XIII. r. 7.

mesne profits (*p*), arrears of rent, or damages for breach of contract, the plaintiff may as to them proceed as already pointed out in respect of money claims indorsed (*q*).

Letting a defendant in to appear notwithstanding judgment.

In some cases a defendant may, by oversight or from some other reason, have omitted to appear to a writ within the proper time, and the plaintiff may have accordingly signed judgment. Notwithstanding this, if he can shew a good defence on the merits he may, on applying to the Court or a Judge, be let in to defend, but it will usually be on the terms of his paying the costs of the judgment obtained against him by his default, and other terms may be imposed upon him, as he is only let in to defend by the leniency of the Court (*r*).

Non-appearance of an infant or person of unsound mind.

When a defendant who has not appeared is an infant or person of unsound mind not so found by inquisition, the plaintiff cannot sign judgment as in ordinary cases, but he may apply to the Court or a Judge that some proper person may be assigned guardian by whom such person may defend the action. In support of such an application he must shew that the writ was duly served, and that after the time for appearance, and at least six days before the hearing, notice of such application was served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time the writ was served; and also, if an infant, served upon or left at the dwelling-house of the father or guardian of such infant, unless at the hearing of the application this latter point is dispensed with (*s*).

Date of judgment by default.

A judgment by default is dated as of the day on

(*p*) Mesne profits are intermediate profits; that is, profits which have been accruing between two given periods, Brown's Law Dictionary, p. 236, tit. 'Mesne.'

(*q*) Order XIII. r. 8.

(*r*) Order XXIX. r. 14; and see Griffith and Loveland's Pr. p. 209.

(*s*) Order XIII. r. 1.

which the requisite documents are left with the proper officer for the purpose of the entry of the judgment, and the judgment takes effect as from that date (*t*).

Appearance where no defence.

Defendants often appear to actions notwithstanding that they may not have any real defence, for the purpose of gaining time or for other reasons. Under the old practice this frequently worked great injustice to plaintiffs, for it was necessary to go on through all the pleadings and ultimately have the action tried before judgment could be obtained. This is so, and necessarily so, still in actions for unliquidated demands, for there at any rate the question of amount may be always in dispute; but a very important new practice in cases of liquidated demands is now allowed. This is by proceeding under Order XIV., by which it is provided that when a defendant appears on a writ of summons specially indorsed the plaintiff may on affidavit verifying the cause of action, made either by himself or any other person who can swear positively thereto, call on the defendant to shew cause why the plaintiff should not be at liberty to sign final judgment for the amount indorsed on the writ with interest (if any) and costs. This application is made by summons returnable not less than two clear days after service, and a copy of the affidavit on which it issues must be served with it. On the return of the summons the Court or a Judge may, unless satisfied that the defendant has a good defence to the action on the merits, or that under the circumstances the defendant ought to be allowed to defend, make an order empowering the plaintiff to sign judgment accordingly notwithstanding the defendant's appearance. If it appears that although there is a defence to part of the plaintiff's claim, to another part there is not, judgment may be forthwith given for the part to which there is no defence, and one

Order XIV.

(*t*) Order XLI. r. 3.

defendant may be allowed to defend, while judgment may be given against another (*u*).

This new practice is, as would be expected, very much used, and in theory it is excellent, and in some cases excellent also in practice. But unfortunately experience has shewn in many cases that it works inconvenience and increases costs. For instance, a summons may be taken out under this order, heard before a Master, then appealed to a Judge, and then to Divisional Court; perhaps then the defendant is allowed to defend, and then all this expense has been wasted. However, in many cases undoubtedly the practice works well, and the good of it perhaps outweighs the evil.

(*u*) For observations and cases under Order XIV., see Griffith and Loveland's Pr. pp. 217–219.

CHAPTER III.

PROCEEDINGS FROM APPEARANCE TO THE CLOSE OF THE PLEADINGS.

The object of pleadings.

THE pleadings in an action consist of the statements of the plaintiff and defendant respectively, and have for their object the shewing the Court and jury the questions in issue between the parties and the facts on which they respectively rely.

General points as to pleadings.

Before proceeding to consider these pleadings in detail it will be well to notice some points affecting them all generally. It has been before noticed (*x*) that under the practice prior to the Judicature Acts the pleadings were couched in technical language involving considerable repetition, and often from this running to considerable length, and these were points that could well be amended. Pleadings are now to be as brief as the nature of the case will admit of, and to state as concisely as may be the material facts on which the party pleading relies, but not the evidence by which they are to be proved; such statement being divided into paragraphs numbered consecutively, and each paragraph containing as nearly as may be a separate allegation, and dates, sums, and numbers, are to be expressed in figures and not in words (*y*). They are to be printed unless containing less than ten folios (*z*), when they may be either written or printed, or partly

(*x*) Ante, p. 4.
(*y*) Order XIX. r. 4.
(*z*) A folio consists of seventy-two words, every figure being counted as a word (Order XIX. r. 5).

one and partly the other (*a*); and are served by being delivered at the address for service, or if no appearance has been entered they are delivered by being filed with the proper officer (*b*). In the Divisions the special practice of which is now being considered, the only case in which it would appear to be necessary to file a pleading would be where the writ is issued for a fixed sum, and the writ is not specially indorsed, and the defendant does not appear (*c*). Pleadings must be marked on the face with the date when delivered, and the reference to the action (*d*), the Division to which, and the Judge (if any) (*e*) to whom assigned, the title of the action (*f*), the description of the pleading, and the name and place of business of the solicitor and agent (if any), or the name and address of the person delivering the same if acting in person (*g*); and in a pleading denying any allegation in a previous pleading it must not do so evasively, but must answer the point in substance, and generally a fair and substantial answer must be given (*h*). Every party in his pleading must specifically deny any allegation of fact appearing in his opponent's pleadings, or it is taken as admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition; and each party must allege all such facts not appearing in the previous pleading as he means to rely on, or which if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, *e.g.*, fraud, or the Statute of Limitations. When a contract is alleged in any

(*a*) Order XIX. r. 5*a*.
(*b*) Ibid. r. 6.
(*c*) See ante, p. 40.
(*d*) That is, the year when issued, the first letter of the plaintiff's name, and the number of the writ in the particular Division, thus—1878. H. No. 150.
(*e*) This would only be in the Chancery Division. In the Divisions the practice of which is now being considered the Judge is never named.
(*f*) That is, the names of the plaintiff and defendant, thus: Between A.B. plaintiff and C.D. defendant.
(*g*) Order XIX. r. 7.
(*h*) Ibid. r. 22.

pleading a bare denial of the contract by the opposite party is construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise (*i*).

Instances of the shortening of pleadings.

On the point that pleadings are to be stated as concisely as can be the following instances may be noticed. Where in any pleading it is necessary to allege malice, fraudulent intention, or other condition of the mind of any person, it is sufficient to simply allege the same as a fact without setting out the circumstances from which the same is to be inferred (*k*). When it is material to allege notice it is sufficient to simply allege it as a fact unless the form or precise terms of such notice are material (*l*). When any contract is to be implied from a series of letters or conversations it is enough to allege such contract as a fact, and refer to such contracts or letters without setting them out in detail (*m*). No person need state in his pleading a fact presumed by the law in his favour, or as to which the burden of proof lies on the other side, unless the same has first been specifically denied; *e.g.* consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim (*n*).

Statement of claim.

The first pleading in an action is the statement of claim by the plaintiff. Unless the defendant at the time of appearance states that he does not require a statement of claim—as he may do—the plaintiff must deliver one within six weeks from the time of the defendant entering his appearance. Even although the defendant has stated that he does not require a statement of claim the plaintiff may deliver one if he

(*i*) Order XIX. rr. 17–20, 22, 23.
(*k*) Ibid. r. 25.
(*l*) Ibid. r. 26.
(*m*) Ibid. r. 27.
(*n*) Ibid. r. 28.

like within the six weeks, but he is liable to have to pay the costs of it, even although he succeed in the action, if its delivery seems to have been unnecessary. After the six weeks no statement of claim can be delivered unless ordered by the Court or a Judge (*o*). In the case of a specially indorsed writ the plaintiff may if he think fit deliver as his statement of claim a notice to the effect that his claim is what appears in the indorsement of the writ, unless he is ordered to deliver a further statement (*p*). The plaintiff in his statement of claim may specify where the action is to be tried, and if he does not state any place the trial is to be in Middlesex (*q*).

Notice in lieu of statement of claim.

Consequence of statement of claim not being delivered within proper time.

The consequence of the statement of claim not being delivered within the proper time is that it is open to the defendant to apply to dismiss the action for want of prosecution (*r*).

Statement of defence.

The next pleading is the statement of defence by the defendant, which must be delivered within eight days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last (*s*). Where in consequence of the defendant stating that he does not require any statement of claim none is delivered, the defendant may nevertheless deliver a statement of defence within eight days after appearance (*t*), and where leave has been given to a defendant to defend under Order XIV. (*u*), notwithstanding there has not been any statement of claim delivered, he must deliver his statement of defence within eight days from the order giving him leave to defend, or within such other time as may be limited by the order (*x*).

(*o*) Order XXI. *r.* 1.
(*p*) Ibid. *r.* 4.
(*q*) Order XXXVI. *r.* 1. As to changing the place of trial, see post, p. 63.
(*r*) Order XXIX. *r.* 1.
(*s*) Order XXII. *r.* 1.
(*t*) Ibid. *r.* 2.
(*u*) Ante, p. 43.
(*x*) Order XXII. *r.* 3.

Costs may be given.

Notwithstanding a defendant may succeed in an action, and thus get the general costs of it, if by his defence he has put the plaintiff to proof of facts which in the opinion of the Court or a Judge ought to have been admitted, the Court may make such order as to the extra costs occasioned thereby as shall be just (*y*).

Set-off and counter-claim.

If a person who is sued has himself some claim against the party suing him he may set this off by way of counter-claim, *even although sounding in damages;* and such set-off or counter-claim has the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross-claim, but the Court, or a Judge, if of opinion that such counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, may refuse to allow the defendant to avail himself thereof (*z*).

Alteration in previous rule as to set-off.

The alteration in the former practice made by this rule is very great. Formerly a set-off could only be allowed if liquidated, or of such a nature as might be rendered liquidated without a verdict for the purpose; now a claim merely resting in damages may be allowed. Formerly also a set-off could only be allowed to the extent of the plaintiff's claim: now it may go beyond that, and the result of the action be a verdict for a balance for the defendant against the plaintiff. It has been held that in an action by joint plaintiffs a separate counter-claim against one may be set up (*a*).

No pleas in abatement, or new assignments.

No defence is now allowed to be pleaded in abatement (*b*), nor is any new assignment allowed (*c*).

(*y*) Order XXII. r. 4.
(*z*) Order XIX. r. 3.
(*a*) Griffith and Loveland's Pr. p. 256.
(*b*) Order XIX. r. 13.
(*c*) Ibid. r. 14.

Everything that would formerly have been alleged by way of new assignment may now be introduced by amendment of the statement of claim (*d*). A plea in abatement, or dilatory plea, was one of some matter not material to the merits of the proceeding, but technically necessary or proper, *e.g.* to the jurisdiction, or on account of the death of one of the parties, marriage of a female party, &c. (*e*). A new assignment was where from the very general terms of the declaration the defendant was led to apply his plea to a different matter from that which the plaintiff had in view (*f*).

Consequences of defendant not delivering defence within eight days.

If the defendant does not within the proper time put in his statement of defence, the next step by the plaintiff is to proceed on his default, and in the same way as we have seen that the plaintiff's course when the defendant does not appear to the writ differs according to the nature of the writ (*g*), so also here the course differs according to what the plaintiff is suing for.

Where action for a liquidated demand.

Firstly. If the plaintiff's claim is only for a debt or liquidated demand, and the defence is not delivered within the eight days, the plaintiff may at once sign final judgment and issue execution against him, or if there are several defendants against any one of them making default (*h*).

Where action for an unliquidated demand.

Secondly. If the action is for damages or detention of goods, interlocutory judgment may be signed and a writ of inquiry issued, and if there are several defendants, and only one makes default, interlocutory judgment may be signed as to that one, and the action

(*d*) Order XIX. r. 14.
(*e*) Brown's Law Dict. p. 2, tit. 'Abatement, Pleas in.'
(*f*) Ibid. p. 249, tit. 'New Assignment.'
(*g*) Ante, p. 39.
(*h*) Order XXIX. r. 2.

proceeded with against the others; no separate writ of inquiry being issued, but the damages as to all being assessed at the trial (*i*).

Thirdly. If the action is partly for a debt or liquidated demand, and partly for damages or detention of goods, then as to each part the plaintiff may proceed as above stated (*k*). Where action partly for a liquidated amount and partly not.

Fourthly. If the action is for recovery of land the plaintiff may sign judgment to recover possession (*l*). When action for recovery of land.

When the plaintiff signs final judgment in any of the above cases, it is signed first with the costs in blank; they are then taxed and filled in the judgment by a Master.

The next pleading is the reply by the plaintiff, which must be delivered within three weeks after the statement of defence, or if several defendants the last of the statements of defence, shall have been delivered (*m*). Reply.

This is most usually merely a joinder of issue, that is, a traverse or denial and putting in issue of the facts alleged by the defendant in his defence, and if this is so here the pleadings terminate. No pleading subsequent to the reply is allowed, except a joinder of issue, without leave of the Court or a Judge, and then upon such terms as the Court or a Judge shall think fit (*n*). Joinder of issue.

A case in which joinder of issue is usually necessary after reply is where the defendant's statement of defence contains also a counter-claim, for this being in effect equivalent to a statement of claim in a cross action, the plaintiff's reply is equivalent to his state-

(*i*) Order XXIX. rr. 4, 5.
(*k*) Order XIX. r. 6.
(*l*) Order XXIX. r. 7.
(*m*) Order XXIV. r. 1.
(*n*) Ibid. r. 2.

ment of defence therein, and the subsequent joinder of issue by the defendant to his reply. It is not often that any pleading beyond this can be required. Any pleading subsequent to reply must be delivered within four days after the delivery of the previous pleading unless otherwise ordered (*o*).

When the pleadings are closed.

As soon as either party has joined issue upon any pleading of the opposite party simply without adding any further or other pleading thereto, the pleadings as between such parties are deemed to be closed (*p*), and the object of the pleadings being at an end the cause is ready to go to trial; but if it is made to appear to a Judge that the pleadings do not sufficiently define the issues of fact in dispute between the parties he may direct them to prepare issues to be tried, to be settled by a Judge if they differ on them (*q*).

Demurrer.

A demurrer is often had recourse to during the pleadings. It is the formal mode of disputing the sufficiency in law of the pleading of the other side (*r*), occurring when the plaintiff or defendant, as the case may be, admits, for the sake of argument, that what is stated in his opponent's pleading is true, but denies that it gives him any good ground of action or defence. Any party may demur (*s*), and the demurrer must state specifically whether it is to the whole or a part, and if so, to what part of the pleading of the opposite party, and must state some ground in law for the demurrer, although on argument the party may go beyond such ground (*t*). When a party desires to demur to part of a pleading and defend as to part, the two may be combined in one pleading (*u*). A demurrer not so com-

Time for demurring.

(*o*) Order XXIV. r. 3.
(*p*) Order XXV.
(*q*) Order XXVI.
(*r*) Brown's Law Dict. p. 115, tit. 'Demurrer.'
(*s*) Order XXVIII. r. 1.
(*t*) Ibid. r. 2.
(*u*) Ibid. r. 4.

bined in another pleading is delivered in the same manner and within the same time as the pleading would be which it stands in the place of (*x*). When a demurrer is delivered either party may enter it for argument immediately and give notice thereof to the other party. If the other party disputes the demurrer and considers his pleading good as it stands, he should enter the demurrer for argument and give notice thereof within ten days, otherwise it will be held sufficient (*y*); and if he considers he can improve his pleading he should proceed to amend it by leave, which leave will only be granted on payment of the costs of the demurrer (*z*). Whenever a demurrer to an entire pleading is allowed upon argument, the party whose pleading is demurred to pays the costs of the demurrer (*a*); and if the pleading demurred to was a statement of claim, the costs of the action also, unless otherwise ordered (*b*). When a demurrer is overruled on argument the demurring party pays the costs of it unless otherwise ordered (*c*). When a demurrer is argued and allowed, or overruled as the case may be, the Court has power to allow the party defeated on it to amend his pleading, or to raise by pleading any facts he may be desirous of setting up (*d*).

How disposed of.

Amendment after demurrer.

The following would be an instance of a demurrable pleading. An indorsee for value of a bill of exchange sues the acceptor, who simply sets up in his defence that he received no value. This, though it would be a good defence in an action brought against him by the drawer, is no defence to the action of the indorsee. The plaintiff can therefore demur to the defence.

Instance of a demurrable pleading.

Most defences have always existed, or at any rate

Defences arising pending the action.

(*x*) Order XXVIII. r. 3. See Griffith and Loveland's Pr. p. 292.
(*y*) Order XXVIII. r. 6.
(*z*) Ibid. r. 7.
(*a*) Ibid. r. 8.
(*b*) Ibid. r. 9.
(*c*) Ibid. r. 11.
(*d*) Ibid. rr. 9, 12.

have existed before action brought; but sometimes a defence may arise only after it has been commenced, *e.g.*, where after it is brought the defendant gets his discharge in bankruptcy. Such a defence, although it did not exist when the action was brought, may be set up either by the defendant, or by the plaintiff to a counter-claim, but if it arises on the defendant's part after statement of defence has been delivered, or after the expiration of the time for delivering the statement of defence, or if it arises on the plaintiff's part after reply has been delivered, it can only be set up within eight days of its having arisen, and by leave of the Court or a Judge (*e*). Where a defendant has set up any defence that has arisen pending the action, the plaintiff may at once confess it, and—as it did not exist when he brought his action—may sign judgment for his costs up to the time of pleading it (*f*). This practice is similar to the former plea of *puis darrein continuance.*

Amendment of pleadings.

Very full powers of amendment of pleadings exist. The Court or a Judge has power at any stage of the proceedings to allow either party to alter his statement of claim, or defence, or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments may be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties (*g*). In particular, also, a plaintiff may once at any time before the expiration of his time to reply, or where no defence has been delivered within four weeks from the appearance of the defendant who last appeared,

When amendments may be made without leave.

(*e*) Order XX. rr. 1, 2.
(*f*) Ibid. r. 3.
(*g*) Order XXVII. r. 1. For instances of amendments allowed under this rule, see Griffith and Lovcland's Pr. pp. 283–286.

amend his statement of claim without any leave (*h*). A defendant, also, who has set up in his defence any set-off or counter-claim may any time before the expiration of the time allowed him for pleading to the reply, and before pleading thereto, or in case there is no reply, then at any time before the expiration of twenty-eight days from the filing of his defence, amend such set-off or counter-claim without any leave (*i*). Such amendment, however, made without leave, may on application within eight days of delivery be disallowed if the Court or a Judge considers proper to so disallow it (*k*).

Time to amend under order.

When an order for leave to amend is made the pleading must be amended within the time named in the order, or if no time is named, then within fourteen days from the date of the order, otherwise it becomes *ipso facto* void, unless the time is extended (*l*).

How amendments made.

Every amended pleading must be marked with the date of the order (if any) under which it is amended, and also with the day on which the amendment is made, and be delivered to the opposite party within the time allowed for amending (*m*). If the amendments do not exceed two ordinary folios (*n*) in any one place, the amendments may be made in writing, unless it would render the pleading difficult or inconvenient to read, in which case, or if they exceed the beforementioned length, the pleading must be reprinted (*o*).

Between the appearance and the close of the pleadings in every action various interlocutory applications

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(*h*) Order XXVII. r. 2.
(*i*) Ibid. r. 3.
(*k*) Ibid. r. 4.
(*l*) Ibid. r. 7.
(*m*) Ibid. rr. 9, 10.
(*n*) That is seventy-two words to each folio, every figure counting as a separate word.
(*o*) Order XXVII. r. 8.

of more or less importance are invariably made, and other interlocutory steps may be taken. Before, therefore, proceeding further with the direct course of an ordinary action it is necessary to devote some attention to them.

In the Appendix to this work the student will find a complete set of pleadings in an imaginary action.

Applying on admissions.

It may be here noticed that any party may at any stage of the action apply to the Court or a Judge for such order as he may upon any admissions of fact in the pleadings be entitled to without waiting for the determination of any other question (*p*).

In an action for recovery of land the rules as to pleadings are not quite the same as in other actions, it being provided that a defendant in any such action in possession by himself or his tenant need not plead his title unless his defence is of an equitable nature, but, except in such case, it is sufficient for the defendant to state that he is so in possession, and he may then rely upon any ground of defence he can prove (*q*).

(*p*) Order XI. r. 11.
(*q*) Order XIX. r. 15.

CHAPTER IV.

INTERLOCUTORY PROCEEDINGS.

INTERLOCUTORY applications are sometimes made to the Court, sometimes to a Judge or Master in Chambers. When the application is made in Chambers, it is done by means of a summons, on which an order is made. When the application is made to the Court, it is done by means of a motion, on which, in the first instance, usually a rule *nisi* is granted, which may afterwards be made a rule absolute. That is to say, that a first application is made *ex parte*, and if a *primâ facie* reason is shewn for granting what is asked, an order is made for it, unless by a certain day cause is shewn against it by the other side. This is a rule *nisi*, and if no cause is shewn against it, or if, on argument, the Court is still of opinion that what is asked for should be granted, it is then made absolute; if not it is discharged.

Summons and order.

Motion and rule *nisi* and rule absolute.

A very frequent application is for an extension of the times allowed for taking the different steps in the action, and such extension may be granted even after the expiration of the time appointed or allowed (*r*). As matter of practice it is a rule to always grant one application for time to deliver a pleading, but for any further time some special reason must be shewn, and then the party applying usually has to pay the costs of the application. The Court also, in granting any extension, is not granting anything that the party is entitled to as a right, but is granting a favour, and therefore can always, in giving the time, put the party under any terms; for instance, on granting a defendant time to

Summons for time.

Granting time on terms.

(*r*) Order LVII. r. 6.

deliver his statement of defence, it can do so on the terms that he should take short notice of trial instead of what he is entitled to (*s*), or the best notice of trial that the plaintiff may be able to give, so as to enable him to have his case tried without delay. Sometimes, too, the order for time is made "peremptory," that is on the condition that the party shall not apply for time again.

Payment into Court.

Payment of money into Court in an action is a step that very frequently occurs. An action may be brought against a defendant on a cause of action on which he admits a liability, but not to the extent claimed by the defendant; here to go on and contest the question of amount only would certainly entail on the defendant the costs of the action, for the plaintiff would recover something, but if he pays a sum into Court the plaintiff will, if he goes on, be going on at his own risk as to costs if he do not recover more than paid in.

Former practice hereon.

Under the former practice, except in a few cases (*t*), money could only be paid into Court when the action was for a debt or liquidated demand, and then only with the plea. This payment into Court with the plea was all that could be desired if the defendant had made a tender before the action, because he could then plead the tender and pay the same amount into Court, and if the plaintiff did not recover more the defendant got the whole costs of the action; but where there was no tender before action, as no tender can be made after action, the defendant had at any rate to pay the costs down to the plea and payment into Court. This was, however, obviated thus:—the defendant would take out a summons to stay the action on payment of the sum he admitted, and if this was not acceded to by the plaintiff, it operated as a tender from that time, so as to throw the costs of the action on the plaintiff

(*s*) Post, pp. 70, 71.

(*t*) An instance was under 6 & 7 Vict. c. 96. See Indermaur's Principles of Com. Law, pp. 311, 312.

from then if he did not recover more. This course is not now necessary, and indeed is no longer allowed (*u*).

New practice hereon.

Under the present practice a defendant is at liberty in any action to recover a debt or damages, to pay money into Court at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the Court or a Judge at any later time. This payment into Court is pleaded in the defence, and the claim or cause of action in respect of which it is made is specified therein (*v*). If the money is paid into Court at the time of delivering the defence, the fact of payment in appears thereon, but if paid in before, the defendant serves upon the plaintiff a notice that he has paid in such money, and in respect of what claim (*x*).

Course by plaintiff on payment into Court.

The plaintiff, on payment into Court of money, may at once obtain it out, the money being paid to him personally or on his written authority to his solicitor, for the verification of which authority no affidavit is usually necessary (*y*). He then simply continues his action for the balance if not satisfied with the amount paid in; but if he is satisfied with it then he may, within four days after receipt of notice of payment in, or if payment in is first stated in the defence, then before reply, give notice to the defendant that he accepts it in satisfaction of the causes of action in respect of which it is paid in. He then taxes his costs, and if they are not paid within forty-eight hours signs judgment for them (*z*).

Discovery, inspection, &c.

Discovery and inspection of documents are very important interlocutory proceedings. Either plaintiff or defendant, in the course of an action may find it necessary or advisable to obtain information as to certain facts from his opponent, or to know what documents he

(*u*) See Griffith and Loveland's Pr. p. 303.
(*v*) Order xxx. r. 1.
(*x*) Ibid. r. 2.
(*y*) Order xxx. r. 3.
(*z*) Ibid. r. 4.

has in his possession relating to the matters in question in the action, and to inspect the same (*a*).

Interrogatories.

The first of these objects, viz., discovery of facts, is attained by means of interrogatories, which are certain written questions administered to the other party to the action, and required to be answered by him upon oath.

Time for interrogatories to be administered.

These interrogatories may be delivered by the plaintiff with his statement of claim (*b*), or by the defendant with his statement of defence, or by either of them at any subsequent period before the close of the pleadings, without any order for that purpose, and they may also be administered at any time by leave of the Court or a Judge (*c*).

Interrogatories where defendant a body corporate or company.

If the defendant is a body corporate or joint stock company, the plaintiff may apply in Chambers for leave to administer interrogatories to any member or officer (*d*). The costs of improper or unnecessarily lengthy interrogatories may be disallowed by the Court or a Judge or a taxing master (*e*), and if any parts are scandalous—that is couched in unfitting language—or irrelevant—that is, not relating the matters in question—they may be ordered to be struck out (*f*).

Answer to interrogatories.

Interrogatories must be answered by affidavit to be filed within ten days, and if such affidavit exceeds ten folios it must be printed (*g*). If the party claims any privilege from answering any question (*h*), it and the grounds of it, must be stated in the affidavit (*i*). If

(*a*) For information on the subject of discovery and inspection prior to the Jud. Acts, see Griffith and Loveland's Pr. pp. 306–337.

(*b*) However in practice interrogatories are not allowed by a plaintiff before statement of defence put in, as the information given in the defence may often render the interrogatories unnecessary, see Griffith and Loveland's Pr. p. 337 and note (*a*).

(*c*) Order XXXI. r. 1.

(*d*) Ibid. r. 4.

(*e*) Ibid. r. 2.

(*f*) Ibid. r. 5.

(*g*) Ibid. rr. 6, 7, 7*a*.

(*h*) As to cases of privilege, see Indermaur's Principles of the Com. Law, pp. 396–400.

(*i*) Order XXXI. r. 8.

the party interrogated omits to answer within the proper time, or answers insufficiently, the proper course is to apply by summons in Chambers, requiring him to answer, or to answer further, as the case may be, or a *vivâ voce* examination may be ordered (*k*).

Answers used at trial.

The answers to interrogatories are afterwards frequently used at the trial, and in such event any one of the answers may be used as evidence by itself, but if the Judge considers the answers all so connected that the one ought not to be used without the other he may direct them all to be put in (*l*).

Discovery of documents.

Discovery of documents may be obtained by either party to an action by applying by summons, without filing any affidavit in support thereof, asking for an order for his opponent to make an affidavit of documents (*m*).

Inspection of documents.

Inspection of documents is usually obtained in the following manner:—The party requiring inspection gives to his opponent a notice to produce to him any document mentioned in a pleading or affidavit of his. The other party on receipt of this notice should within two days, if the documents are all specified in his affidavit of documents mentioned in the last paragraph, or within four days if not so specified, deliver a notice stating a time within three days at which the documents may be inspected at his solicitor's office. If the notice to produce for inspection is not complied with in this way, the party not complying will be prevented from giving such document in evidence, unless he shews the Court that he had sufficient cause for not complying therewith (*n*). In addition to this an ap-

(*k*) Order XXXI. rr. 9, 10; Griffith and Loveland's Pr. p. 343. As to proceedings subsequently if order to answer not obeyed, see post, p. 62.
(*l*) Order XXXI. r. 23.
(*m*) Ibid. r. 12.
(*n*) Ibid. rr. 14, 16.

plication may be made by summons asking for an order for inspection (*o*); and if in any case documents of which inspection is sought do not appear in any pleading or affidavit of the party, the only course is to apply direct for an order for inspection, but in this case the application must be supported by an affidavit by some person shewing (1) of what documents inspection is sought; (2) that the party applying is entitled to inspect; and (3) that they are in the possession or power of the other party (*p*).

Consequences of disobedience to order for discovery, &c.

The consequence of a person failing to obey any order to answer interrogatories, or for discovery or inspection, is that he is liable to attachment, and also, if a plaintiff, to have his action dismissed for want of prosecution, and if a defendant, to have his defence struck out and to be placed in the same position as if he had not defended (*q*). To ground an application for attachment under this rule the service of the order need not be personal, as is necessary to ground an application for attachment in other cases, but service on the party's solicitor is sufficient, unless the party against whom the application is made can shew that he has had no notice or knowledge of the order, and in this case the solicitor himself is liable to attachment unless he has reasonable excuse (*r*).

Summons for particulars.

An application that is not unfrequently made in the course of an action is for the plaintiff to be ordered to give further and better particulars of his claim; thus, if the plaintiff is suing on a contract containing a series of items, which necessarily cannot all appear in his statement of claim in detail, the defendant may by such an application obtain a detailed statement of account; or again, if the plaintiff is suing for injuries

(*o*) Order XXXI. r. 17.
(*p*) Ibid. rr. 11, 18.
(*q*) Ibid. r. 20.
(*r*) Ibid. rr. 31, 32.

committed, particulars of them may be obtained in this way.

Summons to refer.

When an action consists entirely or mainly of matters of account, a very proper application is for it to be referred to one of the masters, on the ground that it cannot be conveniently gone into at the trial (*s*). If this application is not made, as it should be if the action is really a matter of account, it may be referred by the Judge at the trial.

Summons to refer to County Court.

If an action is brought for a sum on contract not exceeding £50, a defendant may, within eight days from the service of the writ, apply for an order referring the case to the County Court in which the action might have been commenced, and if the plaintiff does not shew good cause to the contrary the order will be made and the case tried in the County Court (*t*).

Summons to change place of trial.

It has been stated that the plaintiff in his statement of claim mentions the place where he proposes that the action should be tried, and in default of his stating any place the trial will be in Middlesex (*u*). An application may always be made to change the place of trial; if made on the part of the plaintiff it will usually be granted on his paying the costs of the application, unless the defendant shews some good ground against changing it; but the application is more usually made on the part of the defendant, and in support of his application he must shew either that to change it in the way he proposes would be more convenient and a saving of expense, or that by reason of local prejudice or otherwise he cannot obtain a fair trial in the place where it is proposed that the trial take place (*x*).

(*s*) 17 & 18 Vict. c. 125, s. 3.

(*t*) 30 & 31 Vict. c. 142, s. 7; Jud. Act, 1873, s. 67. As to the jurisdiction of County Courts, see post, p. 88.

(*u*) Ante, p. 48.

(*x*) See Order XXXVI. r. 1. It may be well to notice here the change in the practice as to the place of trial of an action. The rule was, that if

Summons to dismiss for want of prosecution.

When a plaintiff does not take some step in an action within the proper time appointed for that purpose a summons may frequently be taken out by the defendant asking that his action may be dismissed for want of prosecution. The chief cases in which such an application can be made are:—(1.) Where the plaintiff does not within the time allowed deliver his statement of claim (*y*); (2.) Where he omits to obey an order to answer interrogatories or for discovery of documents (*z*); (3.) Where he omits to give notice of trial within the proper time (*a*).

Summons to hold defendant to bail.

A summons to arrest a defendant in the course of an action—or as it is called to hold a defendant to bail—is an application sometimes though not very often made. By the Debtors Act, 1869 (*b*), it is provided that where the plaintiff proves at any time before final judgment by evidence on oath to the satisfaction of a judge (1) that he has good cause of action against the defendant to the amount of £50 or upwards; (2) that there is probable cause for believing that the defendant is about to quit England unless he is apprehended; and (3) that the absence of the defendant from England will materially prejudice him (the plaintiff) in the prosecution of his action, the Judge may order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court. Where the action is for a

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the action was a local one, such as an action for trespass to land, the place of trial to be named by the plaintiff, called the venue, must be where the cause of action arose; but if the action was transitory, such as an action for debt, the plaintiff might lay the venue where he chose. The venue was, however, liable to be changed on grounds the same as may now be shewn to change the place of trial. By the rule quoted in this note the whole law of venue is abolished and the practice stands as stated in the text.

(*y*) Order XXIX. r. 1.

(*z*) Order XXXI. r. 20.

(*a*) Order XXXVI. r. 4*a*.

(*b*) 32 & 33 Vict. c. 62. As to the arrest of absconding debtors in bankruptcy, see 33 & 34 Vict. c. 76.

penalty or sum in the nature of a penalty other than a penalty in respect of any contract it is not, however, necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England), is to be to the effect that any sum recovered against the defendant in the action shall be paid or that the defendant shall be rendered to prison.

Removal of an action from a district registry.

When an action has been commenced in a district registry (*c*), either party may at any time take out a summons for it to be removed to London, and the Judge may in his discretion make an order removing it (*d*). In the following cases also a defendant may remove such an action as a matter of right, viz.: (1.) Where the writ is specially indorsed and the plaintiff has not within four days after appearance given notice of an application under Order XIV. (*e*), the defendant may so remove it after the expiration of such four days and before delivering a defence and before the expiration of his time for doing so; (2.) Where the plaintiff has made an application under Order XIV. and failed, the defendant may so remove it after the order giving him leave to defend, and before delivering a defence, and before the expiration of his time for doing so; and (3.) Where the writ is not specially indorsed the defendant may so remove it after appearance and before delivering his defence and before the expiration of his time for doing so (*f*). When an action may be so removed of right the removal is effected by the defendant or his solicitor serving upon the other parties or their solicitors notice to the effect that he desires the action to be removed to London, and the

(*c*) As to which see ante, pp. 13, 14.
(*d*) Jud. Act, 1873, s. 65.
(*e*) As to which see ante, p. 43.
(*f*) Order XXXV. r. 11.

action is removed accordingly. If, however, the defendant giving such notice is merely a formal defendant, or has no substantial cause to interfere in the action, the Court or a Judge may order the action to proceed in the district registry notwithstanding such notice (*g*).

Security for costs.

A summons is often taken out in the course of an action asking that the plaintiff may be ordered to give security for costs. The mere fact that the plaintiff is a pauper is no ground for getting security: and the following are the chief cases in which the order for security will be made (*h*):—

(1.) Where the plaintiff is permanently resident abroad, or even in Scotland or Ireland, or elsewhere out of the jurisdiction of the Court. A mere temporary absence is not sufficient, nor is an involuntary absence, as in the case of persons engaged abroad in the public service. The order for security will be made even although the plaintiff is a king of a foreign state (*i*); but it will usually be an answer to the application to shew that the plaintiff is in possession of property within the jurisdiction of a permanent nature, such as land, available to process by the defendant (*k*).

(2.) In any action of tort, on an affidavit that the plaintiff has no visible means of paying his (the defendant's) costs in the action if he fail, the defendant may, unless the plaintiff can satisfy the Judge that he has a cause of action fit to be prosecuted in the High Court, obtain an order for him to give security for such costs or that it be referred to the County Court of the district for trial (*l*). This is naturally a very

(*g*) Order XXXV. r. 12.
(*h*) See hereon Chitty's Arch. Pr. 12th ed. pp. 1414–1421.
(*i*) *Otho, King of Greece* v. *Wright*, 6 Dowl. 12.
(*k*) *Edinburgh Ry. Co.* v. *Dawson*, 7 Dowl. 573.
(*l*) 30 & 31 Vict. c. 142, s. 10.

great protection to defendants in speculative actions of tort.

(3.) Trustees of a bankrupt plaintiff may be ordered to give security for costs (*m*).

(4.) A plaintiff suing for a penalty under the Merchandise Marks Act may be ordered to give security for costs (*n*).

(5.) A limited joint stock company will be ordered to give security for costs, if it can be shewn that if the defendant is successful the assets may be insufficient to pay his costs (*o*).

Interpleader.

The process of interpleader occurs where claims are made by two or more persons against another who claims no interest in the subject matter of the dispute himself, and the object of the process is to have the point of who is entitled decided between the antagonistic claimants. The procedure and practice as to this remains as before (*p*), and applies to all actions in and all Divisions of the High Court (*q*).

The cases in which interpleader arises are two; viz. (1) where an action is actually brought against a person, and (2) where conflicting claims are made on a sheriff in possession. In the former case the defendant may apply for interpleader at any time after being served with a writ of summons and before delivering a defence (*r*); in the latter case, which is indeed much the more frequent in practice, the sheriff applies for interpleader as soon as the conflicting claim

(*m*) 15 & 16 Vict. c. 76, s. 142.
(*n*) 25 & 26 Vict. c. 88, s. 24.
(*o*) 25 & 26 Vict. c. 89, s. 69.
(*p*) The statutes relating to interpleader are 1 & 2 Wm. 4, c. 58; 1 & 2 Vict. c. 45; and 23 & 24 Vict. c. 126, ss. 12–18.
(*q*) Order L. 1. 2.
(*r*) Ibid.

is made on him (*s*); thus, for instance, the sheriff in possession, under a writ of *fieri facias* (*t*) receives notice that the goods of which he has taken possession are claimed by some third party under a bill of sale. The interpleader summons calls the parties before the Judge, and if neither withdraws he may then direct an issue to be tried of who is entitled to the goods; or where the amount in dispute or the value of the goods is but small, he may decide the matter summarily (*u*).

Special case.

A special case is a course sometimes resorted to by parties where they are agreed upon the facts of the case and only desire the decision of the Court upon some point or points of law. Directly after the writ of summons in an action is issued the parties may concur in stating any such special case; it is divided into paragraphs numbered consecutively, and is printed, and signed by the respective parties or their solicitors (*w*). In addition to this special case by consent, if it appears to the Court or a Judge that there is in any action a question of law which it would be more convenient to have decided before any evidence is given on an issue of fact, an order may be made for such point of law to be raised for the opinion of the Court (*x*). No special case to which a person under disability is a party can be set down for argument without leave of the Court or a Judge, which will only be granted on shewing that the statements in such special case which affect such persons under disability are true (*y*).

Costs on interlocutory applications.

On some interlocutory applications a direction is given as to the costs of the application, *e.g.*, that they

(*s*) 1 & 2 Wm. 4, c. 58, s. 6.
(*t*) As to which see post, p. 82. See the enactments as to interpleader set out in Griffith and Loveland's Pr. pp. 151-155.
(*u*) Ibid.
(*w*) Order. XXXIV. rr. 1, 3.
(*x*) Ibid. r. 2.
(*y*) Ibid. r. 4.

are to be paid by one of the parties, that they are to be "costs in the cause," or are to be one of the parties' costs "in any event." The meaning of the expression "costs in the cause" is simply that the costs of the application follow the result of the general costs of the action, which indeed is usually the case; the meaning of the expression, costs "in any event," is that one of the parties is to have the costs of the application in question whatever may be the ultimate result of the action.

Appeals from decisions in Chambers.

Where an application is made in Chambers to one of the Masters, he may, if he thinks fit, refer the matter to a Judge in Chambers. If he does not, nevertheless any person affected by his order or decision may appeal to a Judge in Chambers by summons within four days, and from thence to a Divisional Court (*z*).

(*z*) Order LXIV. rr. 3–6.

CHAPTER V.

TRIAL AND PROCEEDINGS TO CONCLUSION.

HAVING in the last Chapter considered the most usual interlocutory applications and proceedings in the course of an action, we may now continue its ordinary course, which we have pursued up to the close of the pleadings, and in which, therefore, the next step is to go to trial (*a*).

Notice of trial.

The first step towards the trial is to give notice of trial, which may be by the plaintiff with his reply, or at any time after the close of the pleadings (*b*). If he does not give notice of trial within six weeks after the close of the pleadings the defendant may then give notice of trial, or may apply to have the action dismissed for want of prosecution (*c*). The notice of trial specifies the mode of the trial, which may be either (1) before a Judge or Judges alone; (2) before a Judge with assessors; (3) before a Judge with a jury; or (4) before an official or special referee, sitting with or without assessors; but the defendant, upon giving notice within four days from the time of the service of the notice of trial, to the effect that he desires to have the issues of fact tried before a Judge and jury, is entitled to have the same so tried (*d*); so that this in effect gives either party a right to a jury.

Mode of trial.

Length of notice.

The length of the notice of trial is ten days, unless

(*a*) See ante, p. 56.
(*b*) Order XXXVI. r. 3.
(*c*) Ibid. rr. 4, 4*a*.
(*d*) Ibid. rr. 2, 3.

the defendant is under terms to take short notice (*e*), which is a four days' notice (*f*). The notice of trial in London or Middlesex does not operate for any particular sittings, but is deemed to be for the first day on which the case can be reached after the expiration of the notice; elsewhere than in London or Middlesex it is deemed to be for the next assizes at the place for which notice of trial is given (*g*). No notice of trial once given can be countermanded, except by consent or by leave of the Court or a Judge (*h*).

Countermand.

The notice of trial having been given, the next step is to enter the cause for trial. In London or Middlesex the party giving the notice should do so either on the day of the notice or the day after; if, however, he does not, his opponent may enter it within the four subsequent days, making in all a period of six days within which the cause may be entered; and if within that time neither party enters it the notice of trial falls through, and the action is in the same position as if no notice of trial had been given (*i*). Elsewhere than in London or Middlesex either party may enter the cause for trial, and if they both enter it, it is tried in the order of the plaintiff's entry (*k*).

Entry of cause for trial.

The next thing to be done by the parties is to prepare for the trial; and in the preparation for trial two notices that are usually given in actions should be observed, viz., a notice to produce documents at the trial, and a notice to inspect and admit documents.

A notice to produce is simply a notice given by either plaintiff or defendant calling upon any other

Notice to produce.

(*e*) See ante, pp. 57, 58.
(*f*) Order XXXVI. r. 9.
(*g*) Ibid. rr. 11, 12.
(*h*) Ibid. r. 13.
(*i*) Ibid. rr. 10*a*, 14.
(*k*) Ibid. r. 15.

party to the action to produce certain documents at the trial, and its object is that if the other party does not produce them in accordance with it he may give secondary evidence of their contents by copies or otherwise, which he would not be entitled to do if such notice had not been given (*l*). A notice to inspect and admit is simply a notice given in a like way, but calling on the other party to come and inspect certain documents at a certain time and place, and admit them, so as to save the expense of calling witnesses to prove them at the trial. If the other party neglects or refuses to admit the documents the costs of proving them at the trial will have to be paid by him whatever the result of the action may be, unless at the trial the Court certify that the refusal to admit was reasonable. No costs of proving any documents are allowed unless this notice is given, except where the omission to give it has been, in the opinion of the taxing officer, a saving of expense. The party, if he admits the documents, only admits them saving all just exceptions, which means that he does not thereby preclude himself in any way from contesting the validity of any document or objecting to it on the ground of its not being stamped or otherwise (*m*). When documents are admitted, an affidavit of the solicitor or his client of the due signature of the admission which is annexed to his affidavit is sufficient (*n*).

Notice to inspect and admit.

Briefs, &c.

Before the day of the trial briefs are prepared on behalf of the respective parties to the action, containing a statement of the case of the party on behalf of whom the brief is given, and a list of the witnesses to be called on his behalf and particulars of what each

(*l*) See Indermaur's Principles of the Com. Law, p. 375.
(*m*) See Order XXXII. r. 1.
(*n*) Ibid. r. 2. The student should be very careful not to confuse this notice to inspect and admit given above with the notice to produce for inspection which may be given in the course of an action. The latter has for its object only the seeing the documents in the course of the action, see ante, p. 61.

witness will prove; also notes as to the cross-examination of any witnesses expected to be called on the other side, and generally a brief should contain all such information as may be useful to counsel. A copy of the brief, the pleadings, the notices to produce and to inspect and admit, and any other necessary documents are delivered to each counsel employed on behalf of the particular party. Sometimes only one counsel is employed, sometimes two or more, according to the importance of the case; most usually there are two, a Queen's counsel and a junior. Usually also before the trial a consultation or conference is arranged, so that counsel may be as far as is possible conversant with the facts. Fees are of course paid with the briefs and for the consultation or conference, and if the case is not reached at the sittings or assizes for which the brief is delivered a fee called a refresher is also paid, as is also the case if the trial of the action occupies more than one day.

Subpœnas, and as to witnesses generally.

The attendance of witnesses at the trial is enforced by means of subpœnas. A subpœna is a writ by which a person is commanded to appear at a certain place and time, and is either a writ of *subpœna ad testificandum* where a witness is simply required to give his oral testimony, or a *subpœna duces tecum* where, in addition, he is required to bring with him certain documents relating to the matters in question (*o*). Three names may be inserted in each subpœna, and a copy of the subpœna must be served personally on each witness, the original being shewn at the same time. It is usual afterwards to give the witness notice when the cause is coming on. A reasonable sum must be paid to each witness to defray his expenses of appearing under his subpœna, and he is justified in refusing to attend or to give evidence until his proper expenses are paid. If a material witness who has been properly

(*o*) Brown's Law Dict. tit. 'Subpœna,' p. 345.

served and to whom a reasonable sum for expenses has been paid or tendered does not obey his subpœna he is liable to attachment and also to an action. If a witness is resident in Scotland or Ireland a subpœna cannot be issued as a matter of course, but only by leave of the Court or a Judge. If a witness is in Her Majesty's dominions abroad a writ may be issued in the nature of a mandamus to the tribunals there for the examination of the witness there, or instead, and also in all cases where a witness is abroad not in Her Majesty's dominions, a commission may be issued for the examination of the witness there, and the evidence thus taken in either of these ways will be allowed and read as evidence at the trial. The evidence of a witness in Scotland or Ireland may also be taken by commission instead of issuing a subpœna by leave as above stated. If a person who is required as a witness is in custody on civil process his evidence is obtained by his being brought up on *habeas corpus ad testificandum* which is granted by a Judge in Chambers, but if in custody not on civil process an order to bring him up to give evidence must be obtained from one of the principal Secretaries of State or a Judge at Chambers (*p*).

Witnesses out of jurisdiction.

Witnesses under custody.

Taking evidence *de bene esse.*

It sometimes happens that a person who will be required as a witness at the trial is about to go abroad, or is so ill that he is in danger of death. In such cases an order may be obtained for the examination of the witness before a Master or some other person. In support of the summons for such an order it must be shewn by affidavit that the party is a material witness and that he is so about to go abroad or is so dangerously ill, and in this latter case there must be an affidavit of the illness by a medical man. The evidence so taken cannot be used at the trial except by consent,

(*p*) See Chitty's Arch. Pr. 12th ed. pp. 355, 356.

unless it is shewn to the satisfaction of the Judge at the trial that the deponent is unable to attend (*q*).

Jury.

The trial, in the majority of cases, takes place before the Judge and a jury (*r*), the jury being more usually a common jury (*s*), in which case they are ready as a matter of course, or it may be a special jury (*t*). Either plaintiff or defendant has, if he thinks fit, a right to a special jury; the course to obtain it being for the plaintiff to give notice to that effect with his notice of trial, on the defendant six days before the day of trial. Notice is then given to the sheriff of the requiring a special jury and the action is marked as a special jury case in the associate's book. If, however, the notice for a special jury is given by the defendant in London or Middlesex for the purpose of delay, the Court may order the action to be tried before a common jury. The party who obtains the special jury has to pay all the extra costs occasioned by it whatever may be the result of the action, unless the Judge before whom the action is tried certifies that the cause was one proper to be tried before a special jury (*u*).

(*q*) See Chitty's Arch. Pr. 12th ed. pp. 329–337.

(*r*) All persons between twenty-one and sixty are liable to serve on a jury, provided they have the necessary property qualification, as described in notes (*s*) and (*t*), and also provided they are not exempted from so serving. The chief persons exempted are peers, judges, magistrates, clergymen, doctors, and barristers; but there are numerous other exemptions of less importance. A juryman who has been summoned, and fails to attend, is liable to be fined. Any party who is dissatisfied with a juryman on the ground of want of the necessary property qualification, or by reason of some supposed bias or partiality, or on some other grounds, may object to him, which objection is called a challenge. The jury are summoned to attend by the Sheriff (Chitty's Arch. Pr. 12th ed. pp. 430, 431).

(*s*) The main qualifications of a common juror are that he should have £10 a-year from freeholds or copyholds, or £20 a-year in leaseholds, or be a householder rated or assessed to the poor-rate, or to the inhabited house duty in Middlesex, on a value of not less than £30, or in any other county not less than £20 (Chitty's Arch. Pr. 12th ed. pp. 431, 432).

(*t*) Special jurors are persons of a higher degree than common jurors, such as bankers or merchants (Chitty's Arch. Pr. 12th ed. p. 432.)

(*u*) Chitty's Arch. Pr. 12th ed. p. 371.

The trial.

Finally, the action in its due order comes on to be tried, and, taking there to be two counsel on each side, it proceeds as follows:—The plaintiff's junior counsel states shortly the effect of the pleadings, and the senior counsel states his client's case; the witnesses are then called and respectively examined by one of these counsel; cross-examined, if necessary, by the senior counsel on the other side, and then, if necessary, re-examined on any new points that have been raised by the cross-examination. The plaintiff's case being closed, the defendant's senior counsel states his client's case, and, in the same way as was done by the other side, his witnesses are now called, and examined, cross-examined, and re-examined. He then addresses the jury on the evidence, and the plaintiff's senior counsel replies on the whole case. The Judge then sums up, telling the jury the points on which their verdict is required; and when they have considered the matter, they announce their verdict through the foreman they have chosen amongst themselves (*x*). If after the plaintiff's case is closed, the defendant's counsel announces that he does not intend to call any witnesses, the plaintiff's counsel must at once address the jury, and the defendant's counsel concludes with his address, thus having the last word to the jury. In the foregoing remarks it is put as if the plaintiff's counsel always commences and so almost invariably it is; but the general rule is that the party to begin is he on whom the affirmative in the action lies, or, more correctly, the one who in the absence of proof on either side would substantially fail in the action (*y*).

The verdict.

The verdict is the unanimous decision of the jury on the facts submitted to them; if they cannot agree

(*x*) In the above nothing is said about the evidence being by affidavit, because such a thing in the Divisions in which we are now considering the practice is not usual. Evidence by affidavit often occurs in the Chancery Division, and is dealt with post, pp. 94–96.

(*y*) Chitty's Arch. Pr. 12th ed. p. 383.

on their verdict after a reasonable time, unless the parties agree to accept the verdict of a majority, they are discharged, and the action must be tried again.

Postponement of trial.

It sometimes happens that at the trial one of the parties finds it necessary to apply for a postponement of the trial. This application may be granted on good grounds, but it is usually only done on the terms that the party applying pays the costs of the day—that is, those costs which will have to be incurred over again on account of the postponement, such as the issuing of fresh subpœnas, refreshers to counsel, &c.

Costs of the day.

Withdrawing a juror.

In the course of a trial, sometimes the parties agree that the action shall come to an end, and that each party shall pay his own costs. This object is accomplished by withdrawing a juror, and the action cannot then be brought over again (*z*).

Nonsuit.

A nonsuit is, technically, where the plaintiff does not appear at the trial, and the defendant succeeds by his default. A nonsuit, however, more usually occurs where the plaintiff finds he cannot succeed in his action, and submits to be nonsuited—that is, to let it be considered as if he were not present. He cannot be nonsuited against his will. A nonsuit formerly had this advantage over a verdict for the defendant, viz., that the plaintiff might bring the same action over again, so that in many cases a plaintiff would submit to be nonsuited in the hope that at the next trial he might have some additional evidence, or in other ways be better prepared (*a*); but it has not now any such advantage, it being provided that any judgment of nonsuit, unless otherwise ordered, shall have the same effect as a judg-

(*z*) Chitty's Arch. Pr. 12th ed. p. 408.
(*a*) Ibid. p. 409.

ment upon the merits for the defendant, except that it may be set aside in cases of mistake, surprise, or accident, on such terms as to the Court or a Judge shall seem just (*b*).

Effect of plaintiff and defendant respectively not appearing at trial.

The effect, then, of the plaintiff not appearing at the trial while the defendant does, is that a judgment of nonsuit, or judgment dismissing the action, is entered; but in addition to this, if the defendant has any counter-claim, he may prove such claim so far as the burden of proof lies on him (*c*). If the defendant does not appear at the trial, while the plaintiff does, the plaintiff may prove his claim so far as the burden of proof lies on him (*d*). Any verdict or judgment, however, obtained where one party does not appear at the trial, may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within six days after the trial (*e*). If neither party appears at the trial, the cause is struck out. The Court or a Judge may, if he thinks it expedient in the interest of justice, postpone or adjourn a trial for such time or upon such terms (if any) as he thinks fit (*f*).

Judgment.

Judgment—that is, the sentence of the law pronounced by the Court upon the matter appearing from the previous proceedings in the suit (*g*)—follows on the verdict. In all ordinary cases the Judge, either at the trial or after argument on some subsequent day, directs judgment to be entered in accordance with the verdict (*h*); but if he abstains from directing any

(*b*) Order XLI. r. 6. As a matter of fact, where a party would formerly have elected to be nonsuited the Judge now interferes and directs the judgment of nonsuit to have the same effect as formerly (Griffith and Loveland's Pr. p. 397).
(*c*) Order XXXVI. r. 20.
(*d*) Ibid. r. 18.
(*e*) Ibid. r. 20.
(*f*) Ibid. r. 21.
(*g*) Brown's Law Dict. p. 198, tit. 'Judgment.'
(*h*) Order XL. r. 1.

judgment to be entered, the action is set down on motion for judgment before the Divisional Court. If the plaintiff does not so set it down, and give notice to the other parties within ten days after the trial, any defendant may do so (*i*). At the hearing of this motion the Court decides which of the parties is entitled to judgment under the verdict given on the facts. In some cases the Judge at the trial directs judgment to be entered for one of the parties, subject to leave reserved to the other to move the Divisional Court for judgment in his favour. This motion should be made within ten days after the trial (*k*). If, however, the Judge has not reserved any leave to move, but has simply directed judgment to be entered for one of the parties, any party may apply to set aside the judgment, and to enter any other judgment. Any such application as last mentioned is made to the Court of Appeal (*l*).

Explanation.

The cases in which a Judge would decline to direct judgment to be entered at the trial, or in which, though directing it to be entered, he would reserve leave to move, or in which the other party, even without such leave, would apply to set aside the judgment, are cases in which on the special facts of the case as found by the jury there is, or is considered to be, a doubt as to which of the parties is in law entitled to the judgment. In all ordinary and simple cases there is no such doubt, and judgment goes, as a matter of course, in accordance with the verdict.

No action, except by leave of the Court or a Judge, can be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do (*m*).

(*i*) Order XL. r. 3.
(*k*) Ibid. r. 2.
(*l*) Ibid. r. 4*a*. As to appeal generally, see post, Part IV.
(*m*) Ibid. r. 9.

New trials

An application not at all unfrequently made after verdict, is for a new trial. The following are the chief grounds of the application:—(1.) That the Judge has misdirected the jury upon some point of law; (2.) That he has wrongfully admitted or rejected certain evidence; (3.) That the verdict is against the weight of the evidence; (4.) That the damages are excessive; (5.) That the damages are too small (*n*.); (6) The misconduct of the jury, as if they cast lots to decide the verdict (*o*). No new trial can, however, be granted on those grounds numbered one and two, viz., misdirection, or wrongful admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned to the trial of the action, and if it appears to the Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give a new trial as to that part only, without in any way interfering with the finding or decision upon any other question (*p*). The ground given above, numbered three, viz., that the verdict is against the weight of the evidence, is no ground for a new trial when the trial has taken place before a Judge alone without a jury (*q*).

To whom application for new trial made; time for, &c.

The application for a new trial is made to a Divisional Court, unless the trial has been by a Judge without a jury, when the application is made to the Court of Appeal (*r*). The application to a Divisional Court must, if the trial has taken place in London or Westminster, be made within four days after the trial, or on the first subsequent day on which such Court sits to hear motions. If the trial has taken place elsewhere, the motion must be made within the first four

(*n*) A very strong case however has to be made out to succeed on either of the grounds numbered four and five.
(*o*) See Chitty's Arch. Pr. 12th ed. pp. 1518–1534.
(*p*) Order XXXIX. rr. 3, 4.
(*q*) Chitty's Arch. Pr. 12th ed. p. 1523.
(*r*) Order XXXIX. r. 1.

days of the following sittings (*s*). If the rule nisi (*t*) is granted, it calls on the other party to shew cause against it at the expiration of eight days therefrom, or so soon thereafter as the case can be heard, and a copy thereof must be served within four days from being granted (*u*).

If upon any motion for judgment, or for a new trial, the Court considers that it has not sufficient materials before it, it may direct the motion to stand over for further consideration and direct any issues to be tried if necessary (*v*).

Entry of judgment, &c.

When judgment is pronounced, it is afterwards duly entered by the proper officer of the Court, being dated as of the day on which it was pronounced, and from which time it takes effect (*x*). After judgment the successful party proceeds to tax his costs, the amount of which is then filled in the judgment (*y*).

Steps to enforce judgment.

The judgment being thus complete, if payment of the amount of it is not made, the next thing is to enforce it, which is most usually done by issuing execution (*z*). Execution is issued by producing to the proper officer the judgment with a præcipe containing the title of the action, &c., and a form of writ of execution, which must be indorsed with the name of the solicitor issuing it, and if he is agent, then with the two names, and also with a direction to the sheriff or other officer or person to whom the writ is directed, to levy the amount actually due (*a*). If after the judgment a part of the amount is paid, the body of the writ nevertheless pursues the judgment strictly, but the indorsement is only to levy

(*s*) Order XXXIX. r. 1*a*.
(*t*) As to which see ante, p. 57.
(*u*) Order XXXIX. rr. 1*a*, 2.
(*v*) Order XL. r. 10.
(*x*) Order XLI. rr. 1, 2.
(*y*) As to taxation of costs see post, p. 89.
(*z*) Order XLII. r. 1.
(*a*) Order XLII. rr. 9–14.

the actual amount due. A writ of execution may be issued on a judgment directly it is duly entered, unless postponed, as it may be. Execution must be issued within six years of the judgment, and before any change in the parties has occurred by death or otherwise, unless leave is obtained from the Court or a Judge to issue execution afterwards. The writ of execution remains in force for one year, but may be renewed for one year from the date of renewal, and so on from time to time, by the writ itself, or a notice of renewal to the sheriff, being marked with a seal of the Court, bearing the date of the renewal, which is sufficient evidence of the renewal (*b*).

Writs of execution.

The chief writs of execution that may be issued in ordinary cases are writs of *fieri facias*, *capias ad satisfaciendum*, and *elegit*.

Fieri facias.

A writ of *fieri facias* (shortly called a writ of *fi. fa.*), is a writ directed to the sheriff commanding him that of the goods and chattels of the debtor he do cause to be made the sum indorsed on the writ, together with interest at 4 per cent (*c*). The sheriff executes this writ by taking possession of the party's goods and chattels and selling the same.

Ca. sa.

A writ of *capias ad satisfaciendum* (shortly called a writ of *ca. sa.*) is a writ of execution commanding the sheriff to seize the body of the debtor and keep it to satisfy the amount due (*d*). This writ cannot however now often issue, in consequence of the Debtors Act, 1869 (*e*).

Elegit.

A writ of *elegit* is a writ of execution to the sheriff commanding him to appraise the goods of the debtor,

(*b*) Order XLII. rr. 15–19.
(*c*) Brown's Law Dict. tit. 'Fi. fa.,' p. 157.
(*d*) Ibid. tit. 'Capias ad Satisfaciendum,' p. 52.
(*e*) 32 & 33 Vict. c. 62. See Indermaur's Principles of the Com. Law, pp. 297, 298.

instead of selling them, and to deliver them to the judgment creditor in satisfaction, or part satisfaction, of the judgment debt. If this is not sufficient to satisfy the judgment debt, then the lands themselves may be taken possession of, and the judgment creditor holds them until out of the profits his debt is satisfied (*f*).

In many cases the debtor may not have any goods or lands on which execution can be levied, but there are two other modes of enforcing the judgment, which though equally applicable in all cases, may be specially useful then; viz., a garnishee order and a charging order.

Garnishee order.

A garnishee order is an order obtained by a judgment creditor against some third party who owes money to the judgment debtor, commanding him to pay such money to the judgment creditor, in satisfaction, or part satisfaction, of his debt. It is obtained on an *ex parte* application of the judgment creditor, supported by the affidavit of himself or his solicitor, that judgment has been recovered, and to what amount, and is still unsatisfied, and that some third person within the jurisdiction is indebted to the judgment debtor; and upon this the Court or a Judge may order such debt to be attached, and also order the third person, who is called the garnishee, to appear and shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt (*g*). Service of this order binds the debt in the garnishee's hand from that time, and if he does not pay the amount claimed into Court, or dispute the debt, or appear on the summons, execution may be

(*f*) Brown's Law Dict. tit. 'Elegit,' p. 135. When the judgment creditor has satisfied himself out of the profits, the debtor may recover back the lands by ejectment, or by action in the Chancery Division. See Chitty's Arch. Pr. 12th ed. p. 692.

(*g*) Order XLV. *r.* 2.

issued against him for the amount (*h*); if, however, the garnishee disputes his liability, an issue may be directed to try the question (*i*). If a judgment creditor does not actually know any one who owes money to the judgment debtor, but has reason to suspect that some such debt may be owing, he may obtain an order, in the first instance, for the oral examination of the judgment debtor as to whether any and what debts are owing to him, and for the production of any books or documents (*k*).

Charging order.

A charging order is an order charging the amount of any judgment upon stock of the judgment debtor. When any judgment debtor has any Government stocks or funds, or any stocks or shares in his own right, any judgment creditor may apply for an order for the same to stand charged with the judgment debt, and any such order entitles the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor, except that no proceedings can be taken to have the benefit of such charge until after the expiration of six calendar months from the date of the order. Any such order is, in the first instance, *ex parte* only, and may be varied or discharged on due cause shewn (*l*).

Enforcing judgments when not for land or money.

A judgment for the recovery of any property other than land or money may be enforced by writ for delivery of the property, by writ of attachment, or by writ of sequestration (*m*).

Writ for delivery.

A writ for delivery is a writ commanding the de-

(*h*) Order XLV. r. 4.
(*i*) Ibid. r. 5.
(*k*) Order XLV. r. 1.
(*l*) 1 & 2 Vict. c. 110, ss. 14, 15, and Order XLVI. r. 1. See also enactments hereon fully set out in Griffith and Loveland's Pr. pp. 412, 413.
(*m*) Order XLII. r. 4.

livery up of certain property, and can be enforced by the sheriff distraining on the lands and goods of the person till the same is delivered (*n*).

Writ of attachment.

A writ of attachment is a writ commanding the doing of a certain act, and if not obeyed the party may be imprisoned for contempt of the Court. No writ of attachment can be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued (*o*).

Writ of sequestration.

A writ of sequestration is a writ issued for the purpose of levying on a person's property on account of his disobedience to the judgment or order of the Court.

Writ of possession.

A judgment for recovery of land is enforced by a writ of possession, which is a writ issued to the sheriff directing him to put the party in possession of certain lands (*p*).

Writs of *fi. fa. de bonis ecclesiasticis* and *sequestrari facias.*

Where a defendant against whom a judgment has been recovered is a clergyman, there are two writs of execution that may be issued with regard to his benefice; viz., a writ of *fieri facias de bonis ecclesiasticis*, and a writ of *sequestrari facias*. These writs are very similar in their nature, being both directed to the bishop of the diocese, and having for their object the raising of the amount of the judgment debt out of the property of the benefice (*q*).

Execution against a partnership firm.

The student will remember that actions may be brought against a partnership firm in its partnership name without enumerating the particular persons con-

(*n*) Order XLIX.; Chitty's Arch. Pr. 12th ed. pp. 710–712.
(*o*) Order XLIV. See also as to Attachment, post, p. 117.
(*p*) Griffith and Loveland's Pr. pp. 415, 416.
(*q*) Chitty's Arch. Pr. 12th ed. pp. 1283, 1284.

stituting the partnership (*r*). As a doubt might naturally arise in some cases as to whether a certain person is or is not a member of the firm in question, and accordingly whether or not execution may be issued against him, it is specially provided that execution may be issued against any of the direct partnership property, or against any person who has admitted on the pleadings that he is, or who has been adjudged to be, a partner, or against any person who has been served as a partner with the writ and has failed to appear; and in addition to this, that if the judgment creditor claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave to do so, and the Court or a Judge may give such leave if the liability is not disputed, or if disputed may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined (*s*).

Enforcing an order.

Any order of the Court or a Judge may be enforced in the same manner as a judgment to the same effect (*t*).

Judgment *quando acciderint.*

One special kind of judgment should be here mentioned, though not very often occurring. If an action is brought against an executor or administrator and he in his defence states that he has fully administered all assets come to his hands—that is exhausted all assets—or all except some small amount (called formerly pleas of *plene administravit* and *plene administravit præter* respectively), if the plaintiff cannot disprove this defence he may sign a judgment against any assets which may at any time afterwards come to the defendant's hands. This is called a judgment *quando acciderint* (*u*).

(*r*) Ante, p. 32.
(*s*) Order XLII., r. 8.
(*t*) Ibid. r. 20.
(*u*) See Brown's Law Dict. p. 297, tit. 'Quando acciderint.'

The judgment in an action being enforced, the whole object of the action is accomplished and it is at an end. This chapter would, however, be incomplete without a short consideration of the subject of the costs that a plaintiff or a defendant is entitled to and is able to include in his judgment and to enforce against the other party. Costs generally.

The subject of costs at Common Law was, prior to the Judicature Act, one of great intricacy and difficulty, and it cannot be said to be much otherwise now. The whole subject of costs has long stood, and still stands, on a most unsatisfactory footing, for it not unfrequently happens at a trial that neither Judge, counsel, nor solicitors exactly know the position as to costs, and the matter calls for some plain and definite provision from the Legislature. The Author's opinion, from some experience, is that in a work like the present the only effect of going into the whole subject would be to confuse the student, and for this reason all that is attempted here is to state the most usual and important points.

The Judicature Act, 1875, provides that costs are to be in the discretion of the Court, but that this shall not deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the former rules of Equity, provided that where any action or issue is tried by a jury the costs shall follow the event, unless upon application made at the trial for good cause shewn the Judge before whom such action or issue is tried, or the Court, shall otherwise order (*x*). Provision of Judicature Act, 1875, Order LV.

Prior, however, to this the County Courts Act, 1867, had provided that if in any action in one of the Superior Courts the plaintiff should recover a sum not exceeding £20 on contract or £10 on tort he should County Courts Act, 1867.

(*x*) Order LV.

not be entitled to any costs unless the Judge certified that there was sufficient reason for bringing such action in the Superior Court, or unless the Court or a Judge at Chambers should by rule or order allow such costs (*y*).

Construction of provision of Judicature Act, 1875.

It has been held that by costs following the event as mentioned in Order LV., is meant, not that the party obtaining the verdict must invariably get the costs, but only subject to the existence of any statutes in force limiting the right to costs (*z*).

Statement of position now.

The general position as to costs now may be shortly stated to be, that whoever succeeds in the action will get his costs, except that in the case of the plaintiff being the successful party, if the amount does not exceed £20 on contract or £10 on tort he cannot get costs without a certificate as above mentioned. A special order also altering this general rule as to costs may however be made. In consequence of the provisions of the County Courts Act, 1867, it follows that in actions where the amounts sought or expected to be recovered do not exceed the sums mentioned they should always be commenced in a County Court, except indeed where the County Court has no jurisdiction, which cases are breach of promise of marriage, libel, slander, malicious prosecution, and seduction. Except in these cases the County Courts have jurisdiction up to £50, also in actions to recover any lands or try any title thereto where neither the value of the property nor the rent exceeds £20, and also to recover small tenements from tenants at sufferance when the annual rent or value does not exceed £50 (*a*).

(*y*) 30 & 31 Vict. c. 142, s. 5.

(*z*) *Garnett* v. *Bradley*, 25 W. R. 653, overruling *Parsons* v. *Tinling*, 25 W. R. 255.

(*a*) See 9 & 10 Vict. c. 95; 13 & 14 Vict. c. 61; 30 & 31 Vict. c. 142. As to their jurisdiction in matters coming within the Chancery Division, see post, p. 120

Taxation.

The costs given against an opponent are taxed before one of the Masters. A copy of the bill of costs is delivered to the opponent's solicitor, together with one day's notice of an appointment to tax same, and, if required, an affidavit of increase must be made. This affidavit of increase is an affidavit made by the solicitor or his managing clerk (who must depose that he has had the management of the action), verifying the payments to counsel, to witnesses, length of briefs, &c. The costs having been taxed, the amount thereof is filled in the judgment by the Master (*b*).

Difference between party and party, and solicitor and client costs.

The costs that are obtained against an opponent in an action are called party and party costs, and those that a solicitor charges against his own client are called solicitor and client costs. The difference is that party and party costs comprise only things actually necessary in the action; but solicitor and client costs include not only this, but in addition anything advisable under the circumstances, *e.g.*, conferences with counsel, &c. From this it follows that items may be disallowed in a solicitor's bill taxed as between party and party which he may be entitled to charge against his client as being proper solicitor and client costs.

Delivery of solicitor's bill, and taxation by client.

A solicitor before he can sue a client for his bill of costs, must have delivered it signed, or with a letter signed, a month previously (*c*), unless he can shew that there is probable cause to believe that his client is about to quit England, or to be a bankrupt, a liquidating or compounding debtor, or to take any other steps or do any other act which in the opinion of the Judge would tend to defeat or delay such solicitor in obtaining payment, when leave may be given him to

(*b*) As to regulations generally as to costs, see Additional Rules of Court, of 12 Aug. 1875, Order VI. set out in Griffith and Loveland's Pr. pp. 559–577.
(*c*) 6 & 7 Vict. c. 73.

sue notwithstanding the month has not expired (*d*). Every client has a right to have his solicitor's costs taxed; within a month of the delivery of the bill he may obtain an order for taxation as of course; after a month, he may still obtain this order on application *ex parte* by summons; but after the expiration of twelve months, or after payment, he can only obtain an order to tax on shewing special circumstances, *e.g.*, gross overcharge, or that the bill was paid under protest. If on taxation less than one-sixth is taxed off, the client has to pay the costs of the taxation; but if one-sixth is taxed off, then the solicitor has to pay such costs (*e*).

(*d*) 38 & 39 Vict. c. 79.
(*e*) 6 & 7 Vict. c. 73, s. 37. See further as to solicitors' costs, 33 & 34 Vict. c. 28.

PART III.

OF THE PRACTICE AS SPECIALLY OCCURRING IN THE CHANCERY DIVISION.

INTRODUCTORY.

Before commencing this Part of the work, the student must be reminded of what has already been noticed (*a*), viz., that a great object in the new practice was to assimilate the two previous practices of Law and Equity as far as possible. This it was impossible to do altogether, because of the different kind of cases coming under the cognisance of the Queen's Bench, Common Pleas, and Exchequer Divisions, on the one hand, and the Chancery Division on the other hand; and had there been no such difference, there would have been no necessity for the marking out of the Court into Divisions. But as far as possible—that is to say, in all those proceedings which are necessary to be taken equally in all the Divisions—the steps are the same; and therefore in the present part of this work, wherever this is so, and the matter has already been dealt with in Part II., passing reference is only made, without going again into explanation, as that would be mere useless repetition. On all such points, therefore, if the student has not become thoroughly conversant with them from his perusal of Part II., he must refer back, and, as far as possible, references will be found given throughout to the prior pages in which the subject is dealt with.

(*a*) Ante, pp. 6, 7.

CHAPTER I.

PROCEEDINGS TO THE FIRST HEARING AND JUDGMENT.

Commencing proceedings.

PROCEEDINGS are usually commenced by action, the first step in which is the writ of summons (*b*), but there are, in addition, certain special ways in which in some cases proceedings may be commenced, viz., by petition, motion, summons, and special case. These are however dealt with subsequently in Chapter V. of this Part (*c*). The writ of summons must be marked with the name of one of the Judges of the Division, to whose Court and Chambers it is thereafter attached, unless transferred (*d*).

Appearance.

Service having been effected, the next step is the appearance of the defendant (*e*).

Effect of non-appearance.

The course to be pursued in the event of the non-appearance of the defendant to the writ is usually utterly different to that in the Divisions dealt with in Part II. (*f*), though of course there may be cases in which it is not so; that is to say, in which the action is of such a kind that it could properly have been assigned to one of those other Divisions, had the plaintiff so chosen. It follows naturally that the practice should here be different, for the plaintiff is usually suing for something going far beyond a mere judgment by default, *e. g.*, he may be seeking adminis-

(*b*) Ante, p. 29.
(*c*) Post, p. 121.
(*d*) Order v. r. 4. A cause is often transferred from one Judge to another on account of there being an excess of cases before the former.
(*e*) Ante, p. 35.
(*f*) See ante, p. 39.

tration of some estate with special inquiries, the propriety of which the Court must consider.

The effect, then, of non-appearance to the writ is this, viz., that upon the plaintiff filing a proper affidavit of service, the action proceeds in the same way as if the defendant had appeared (*g*); that is to say, that the plaintiff will go to a hearing, proceed afterwards in Chambers, and then to conclusion, as hereafter detailed, in just the same manner as if the defendant was before the Court, except that the truth of his statements are taken to be admitted.

Pleadings.

The pleadings then take place (*h*); and here the only point necessary to notice is the effect of the defendant making default in delivering his statement of defence. In the same way that the effect of non-appearance is different, as just stated, so the effect of this default in pleading is entirely different from what it would be in the Queen's Bench, Common Pleas, and Exchequer Divisions, and for the same reasons. The result here is this, viz., that the plaintiff may set down the action on motion for judgment so as to have the cause heard in the same way as if no default had been made. If there are several defendants, and one only makes default, the plaintiff may either set down the action at once against him, or wait till it is entered for trial, or set down on motion for judgment against the other defendants (*i*).

Notice of trial, &c.

Notice of trial is then given, and the cause comes on to be heard (*j*). As to the different modes of trial, the student is referred to Part II. Chapter V. (*k*); but a trial by jury does not now often occur in the Chancery

(*g*) Order XIII. r. 9.
(*h*) See ante, Part II. Chap. III.
(*i*) Order XXIX. rr. 10, 11.
(*j*) See ante, p. 70.
(*k*) Ante, p. 70.

Division, for the reason that the matters coming within this Division are, for the main part, matters much more easily dealt with by a Judge than by a jury; and the Court or a Judge has always a discretionary power, if it shall seem desirable, to direct a trial without a jury of any question of fact, or partly of fact, or partly of law, arising in any cause or matter which under the previous practice could, without any consent of the parties, be tried without a jury (*l*). It appears manifestly more convenient that in the Chancery Division there should be no jury, as an occasional jury case tends to block up the Court, and prevent the regular routine of the ordinary business; and where there is really a case in which there is an issue requiring a jury, the Court or a Judge has power to direct that such issue shall be tried by a Judge with a jury (*m*), when the case can go for trial as one in the Queen's Bench, Common Pleas, or Exchequer Divisions, either in London or Middlesex, or at any convenient assizes (*n*).

Evidence.

The evidence at the hearing in this Division is frequently by affidavit. The general rule as to evidence is certainly that in the absence of agreement between the parties it is to be *vivâ voce* unless otherwise ordered (*o*), but very often the parties agree that the evidence shall be by affidavit, according to the old practice in Chancery, and as the more convenient course.

Procedure on agreement to take evidence by affidavit.

The procedure when the parties have consented to the evidence at the hearing being by affidavit is as follows:—Within fourteen days after the consent the plaintiff files his affidavits and gives notice thereof to the defendant or his solicitor; the defendant has then

(*l*) Order XXXVI. r. 26; and see Griffith and Loveland's Pr. pp. 363, 376.
(*m*) Order XXXVI. r. 27.
(*n*) Griffith and Loveland's Pr. p. 373.
(*o*) Order XXXVII. r. 1. See ante, p. 73.

fourteen days within which he files his affidavits in answer, and gives notice thereof to the plaintiff or his solicitor; and the plaintiff then within seven subsequent days files affidavits in reply and gives notice thereof. The above times may be varied by agreement between the parties, or an extension may be granted on application in Chambers (*p*). The affidavits require to be printed (*q*).

Affidavits generally.

Affidavits may be said to consist of four parts, viz., (1) the title, consisting of the heading in the Court, the reference number, and the names of the parties; (2) the name and description of the deponent; (3) the body or contents; and (4) the jurat, that is, a statement of the place where and the date when sworn. They are made in the first person, divided into paragraphs, numbered consecutively, and each paragraph relating, as far as may be, to a distinct subject matter (*r*). They must be confined to such facts as the witness is able of his own knowledge to prove (*s*).

Cross-examination on affidavits.

The witnesses who have made affidavits are liable to be cross-examined thereon. The course is this: within fourteen days after the expiration of the time limited for filing affidavits in reply notice may be given by either party to his opponent to produce any deponent at the trial for cross-examination, and if not produced his affidavit cannot be used as evidence without special leave, and the party requiring such production is not obliged in the first instance to pay the expenses of the witness attending at the trial. The party to whom the notice is given is usually able to arrange with his witness to attend at the trial, but he is entitled also to compel his attendance in the same

(*p*) Order XXXVIII. rr. 1–3.
(*q*) Ibid. r. 6.
(*r*) Daniel's Ch. Pr. pp. 788, 789.
(*s*) Order XXXVII. r. 3, which however provides that on interlocutory applications, statements as to the witnesses' belief, with the grounds thereof, may be admitted. See post, p. 110.

way as he might compel the attendance of a witness to be examined, that is to say, by subpœna (*t*) in the ordinary way (*u*).

The hearing.

To return—notice of trial having been given, the cause set down. and the briefs prepared and delivered, the action in due course comes on to be heard. At the hearing the leading counsel for the plaintiff usually opens and goes into the case, and is followed by his junior, then in like manner the respective senior and junior counsel for the defendant are heard, the plaintiff's leading counsel replies, and the Judge then proceeds to give judgment. This judgment, in most cases, does not dispose of the action altogether, but directs certain accounts and inquiries to be taken and made, which are proceeded with as hereafter explained (*x*), and the action is afterwards ultimately disposed of in the way also hereafter explained (*y*).

Drawing up of judgment.

The judgment pronounced by the Court has now to be drawn up in writing. The procedure to do this is as follows:—The solicitor having the carriage or management of the proceedings (usually the plaintiff's solicitor) leaves his counsel's brief and any other necessary papers with the Registrar (*z*) who is that day attending in the particular Court. The Registrar prepares a draft of the proper order, and the plaintiff's solicitor gives notice to the other parties of an appointment before him to settle it. The solicitors of the other parties procure from the Registrar's clerk copies of the draft order, and attend the appointment in the Registrar's Chambers, produce their counsel's briefs and any other necessary papers, and the Registrar then, in their presence, settles the judgment. If any party is not

(*t*) As to which see ante, p. 73.
(*u*) Order XXXVIII. rr. 4, 5.
(*x*) Post, Ch. II.
(*y*) Post, Ch. IV. Should the evidence not be by affidavit but *viâ voce*, the course at the trial is as described ante, pp. 75, 76.
(*z*) As to this officer, see ante, p. 17.

satisfied that it carries out the true order of the Court, he can bring it before the Court on a motion to vary the minutes. After it is finally settled it is engrossed, and notice of a further appointment given to pass it, which is usually a merely formal appointment, at which the different solicitors examine the engrossment of the judgment, and see there are no inaccuracies in it, and approve it. If any dispute, however, should arise, recourse may be again had to the Registrar. The judgment being passed, it is stamped and copied, or, as it is called, entered in the proper book kept for the purpose, and sealed with the seal of the Court and delivered to the solicitor having the carriage of the proceedings.

Friendly actions.

We have now so far gone through the details of an ordinary contested action in this Division, taking it that it is a contested action; but many actions here are of a friendly nature, being more of an administrative than of a contentious character, or although there may at some subsequent period be contention, yet not up to this stage. For instance, in an administration suit by a residuary legatee under a will he is, as a matter of course, entitled as against the executor to a judgment directing the usual accounts and inquiries, and there is nothing therefore for the defendant the executor to oppose at this stage, although subsequently in Chambers there may be many contentious points; and there may also be points in dispute at the final hearing. In such cases as this, and provided also that the case involves no question of difficulty, and is not likely to take up much time in argument, a speedy method of getting a judgment exists, viz., by having the cause heard as a short cause, which we must now proceed to notice.

Short cause.

Although the cause is intended to be heard in this way, all the pleadings may be gone through as usual, but it is more often the practice after the plaintiff has

delivered his statement of claim, to waive a statement of defence, and thereupon at once to give notice of trial. However this may be, the practice then is for the plaintiff's solicitor to prepare minutes of what judgment he proposes the Court shall be asked to pronounce, and submit them to the defendant's solicitor. These minutes being agreed upon between them, the plaintiff's solicitor gets from his junior counsel a certificate that the cause is one fit to be heard short (*b*), and also a consent from the defendant's solicitor to its being so heard, and to the evidence (if any) being by affidavit. There is usually in such cases no evidence necessary. On this the plaintiff's solicitor sets the cause down to be heard, and it comes on very speedily, on a special day appropriated by each Judge for the hearing of such cases, and judgment is thus obtained in a very short space of time, where, but for this special mode of procedure, months possibly might have elapsed. The judgment being pronounced, it is drawn up as before mentioned (*c*).

The judgment being thus in existence, whether from an ordinary hearing or from a hearing as a short cause, the next subject to be considered is that of the proceedings thereunder in Chambers, which is done in the next chapter.

(*b*) It is usually considered that the cause should be one which on an average will not occupy more than about ten minutes of the Court's time.
(*c*) As to short causes, see Daniel's Ch. Pr. p. 836.

CHAPTER II. (*d*).

PROCEEDINGS IN CHAMBERS UNDER THE JUDGMENT.

Carrying judgment into Chambers and summons to proceed thereon.

THE first step is for the plaintiff's solicitor to make a copy of the judgment in the action, and to certify at the end thereof that it is a true copy. He then carries the same into the Judge's Chambers, and takes out a summons to proceed thereon, and serves the same upon the other solicitor or solicitors in the action.

Directions given at the return of the summons.

At the return of the summons the solicitors attend before the Judge's Chief Clerk (*e*), who gives directions as the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the time within which each proceeding is to be taken, and generally all necessary directions, and appoints a day for further attendance before him. To properly understand these proceedings in Chambers, however, it will be best to take as an instance one particular kind of action and follow it throughout, say an ordinary administration action against an executor or administrator. In noticing the main points in this one instance, the student must bear in mind that although it is but an instance, it shews the general details of the working out of a judgment in Chambers in any case, the only difference being that different kinds of cases involve different accounts and different inquiries, and to particularize

(*d*) On the subject of this chapter generally, and on any points occurring in it as to which no reference is given, and on which the student is desirous of further information, he is referred to Daniel's Ch. Pr. ch. xxix. pp. 1039–1227.

(*e*) As to this officer, see ante, p. 17

different cases is beyond the scope and object of the present work. If the student understands one case thoroughly that is sufficient, for the general practice is the same always.

Instance of an administration action.

To take, then, the instance of an ordinary administration action just mentioned: At the return of the summons to proceed, the Chief Clerk directs the plaintiff's solicitor to insert an advertisement in certain newspapers for creditors to come in and prove their

Advertisement for creditors.

claims. This advertisement is always directed to be inserted in the *London Gazette*, and usually in *The Times* and other chief London morning daily newspapers, or one of them, and if a country case, also in two local papers (*f*).

Inquiry as to pedigree.

If there is any question of pedigree involved, the Chief Clerk directs the plaintiff's solicitor to bring in evidence thereon by a certain day, and he also directs

Accounts.

the accounts of the defendants, the personal representatives, to be brought in duly verified by affidavit, and any other necessary facts to be proved by affidavit by a certain day.

Carrying out Chief Clerk's directions.

The next thing is for the respective solicitors to proceed to carry out the directions given by the Chief Clerk, so as to be ready to proceed at the appointment which has been given for the further attendance

Preparing and inserting advertisement.

before him. The plaintiff's solicitor prepares the advertisement for creditors to come in and prove their claims, which is signed by the Chief Clerk and then inserted in the various papers as directed. This advertisement usually requires all claims to be sent in by a certain day to the solicitor for the defendants, the personal representatives, and it also names a day for all claimants to appear before the Chief Clerk, which is

(*f*) Where the personal representative has already issued advertisements under 22 & 23 Vict. c. 35, s. 29, no further advertisements are generally directed to be issued. Daniel's Ch. Pr. p. 1094.

called an appointment to adjudicate on claims, but at it no creditor need make any affidavit, or attend in support of his claim (except to produce his security), unless he is served with a notice requiring him to do so (*g*), but an affidavit is made by the personal representative or his solicitor, or both, stating what claims have been sent in, and which it is considered should be admitted and which not, and the reasons for this; and then, if necessary, directions may be given for any claimants to prove their debts strictly, and the appointment to adjudicate on claims may be adjourned for this purpose. If no claims have been sent in under the advertisement, an affidavit of no claims is made.

Appointment to adjudicate on claims.

Affidavit of no claims.

If, as suggested in our instance, there is any point as to pedigree, an affidavit is made by the plaintiff, or some person conversant with the facts, proving any marriages, births, and deaths necessary under the circumstances to be proved. The affidavit should have exhibited to it the certificates of the respective marriages, births, and deaths; and in addition to this, for the sake of convenience, it is usual to prepare and carry into Chambers a pedigree which shews at a glance the position as proved by the affidavits. At the adjourned appointment before the Chief Clerk, the affidavits, &c., are considered, and what is proved duly noted down by him. It may be that he is satisfied that the evidence adduced properly answers the inquiry, or it may be that he directs some further evidence to be obtained; in which case the appointment is then adjourned, and so on, from time to time, until he is satisfied.

Pedigree.

Then as to accounts—these are duly prepared by the solicitor of the personal representative, and exhibited to an affidavit by the personal representative verifying them; and in addition, the affidavit, to satisfy other

Affidavit by personal representative on accounts and inquiries.

(*g*) Daniel's Ch. Pr. p. 1094.

several requirements of the judgment, ordinarily states the amount of the deceased's funeral expenses, and gives in a schedule a statement of what his estate consisted at the time of his decease, and of what it consists at that time. This affidavit and the accounts are laid before the Chief Clerk at the appointment which has been given before him; the affidavit at once answers any inquiry in the judgment of what the funeral expenses amounted to, of what the estate consisted of at the deceased's death, and of what it consists then; and the Chief Clerk having seen that the affidavit and accounts are in proper form, refers the latter to one of his junior clerks for the purpose of the items therein being vouched.

Vouching accounts.

The plaintiff's solicitor then obtains an appointment before the junior clerk to vouch the accounts. At the day appointed the solicitors attend, and the solicitor for the personal representative proceeds to vouch by producing all necessary vouchers, such as receipts, &c. Where items of payment are under forty shillings, no voucher is generally required, the oath of the accounting party being considered sufficient (*h*).

Surcharging and falsifying.

Any party who is dissatisfied with the accounts may enter into evidence to shew that certain moneys have been received which are not accounted for, which is called surcharging; or that certain items of payment are wrongly inserted, which is called falsifying. The junior clerk at the appointment, or any adjourned appointment, vouches the accounts as far as he is able; and if there are then any items not properly vouched, or the propriety of which is objected to, he queries the same for the Chief Clerk.

Queries on accounts.

On any such queries an appointment is obtained

(*h*) Daniel's Ch. Pr. p. 1128.

before the Chief Clerk, and he considers the same and disposes of them.

Chief Clerk's certificate.

Taking it, then, that the accounts are disposed of, and all inquiries directed by the judgment duly answered, the next step is the preparation of the Chief Clerk's certificate, which is a document whereby the Chief Clerk specifically states or certifies to the Court the result of the accounts and inquiries that have been referred to him. The Chief Clerk being satisfied that everything necessary has been done, adjourns the proceedings for the certificate. The plaintiff's solicitor then leaves with one of the junior clerks at Chambers, whose duty it is to prepare certificates, all necessary documents, such as office copies of affidavits, &c., and from these documents and the notes of the proceedings in Chambers this official prepares the draft certificate.

Adjourning for certificate.

Settling certificate.

The draft being prepared an appointment is obtained before the junior clerk to settle it. The solicitors then attend; it is gone carefully through, and any queries on it disposed of as far as possible, either at this appointment or any adjournment that may be necessary, and an appointment is then obtained before the Chief Clerk, who finally goes through it and disposes of any queries that may yet remain. It is then engrossed and signed by him, and has next to be formally approved by the Judge, which formal approval usually takes place after four days from the signature of the Chief Clerk. Within these four days, any party who is dissatisfied with the certificate on any point, may take out a summons for the opinion of the Judge thereon (*i*). At the hearing of this summons the Judge may direct any alteration of the certificate, or may consider no alteration necessary, or may direct the same to be considered as an application to vary the certificate (presently

Approval of certificate by Judge.

Summons for opinion of Judge on certificate.

(*i*) See Daniel's Ch. Pr. 1219, pp. 1220.

mentioned) and treat it accordingly. The certificate is then signed by the Judge, and duly filed in the Court.

Application to vary certificate.

But notwithstanding the certificate is thus approved and filed, there is yet a course open to a party dissatisfied in any respect with it, viz., to take out a summons or give a notice of motion to vary it (*k*), which must be done within eight days after the filing, and if the application is not made within that time, the certificate is binding on all parties, unless indeed by special leave it is opened, which will only be done on some very strong case being made out (*l*). On the return of the summons to vary, it is not dealt with in Chambers, but is adjourned into Court; and as the cause will now be usually about to come on for final hearing on further consideration it is usually adjourned to come on at the same time.

When certificate binding.

Notice of judgment.

In some cases the Chief Clerk may have considered that it is necessary for certain persons not parties to the action, but yet interested therein, to be present, or have an opportunity of being present on the accounts and inquiries; *e.g.*, the administration action may be brought by one of several residuary legatees, and of course the others have also equal rights with him. In any such case he will direct them to be served with notice of the judgment, and any person, on being served with such notice, may by an order of course (*m*) obtain leave to attend the proceedings under the judgment. After they have been thus served, they are bound by the proceedings, just as much as if they had been parties to the action. If it is desired to serve notice of the judgment on an infant, an order must be obtained as to how service is to be effected, and a copy

(*k*) Daniel's Ch. Pr. p. 1222.
(*l*) Ibid. p. 1223.
(*m*) As to which see post, p. 109.

of such order served at the same time as serving the notice (*n*).

Conclusion of ordinary proceedings in Chambers.

This concludes the ordinary proceedings in Chambers, and even at the risk of repetition it would seem well to again remind the student that this instance we have gone through should be sufficient to supply him with a general knowledge of the proceedings in Chambers in working out any accounts and inquiries directed by any judgment. The inquiries and accounts may all be different in their nature, but still the steps are the same, the proceedings always concluding with the Chief Clerk's certificate.

Sales under the Court.

Before concluding this chapter, however, it seems advisable to detail the proceedings in Chambers in the case of a sale under the Court, as this very often forms an important part of the working out of a judgment, as it may direct a sale of certain property (*o*).

Special points.

The peculiarities in a sale under the Court are mainly these:—The Chief Clerk first directs who is to have the conduct of the sale, and this will usually be the plaintiff's solicitor; he appoints the day of sale, and directs in what newspapers advertisements of the sale are to be inserted (the *Gazette* is always one of the papers); he refers the abstract of title to one of the conveyancing counsel of the Court (*p*), whose duty it is to report on the title and prepare conditions of sale, and they are then approved of by the Chief Clerk; the Chief Clerk then appoints some person to be the

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(*n*) See hereon Daniel's Ch. Pr. pp. 358–364; Order XVI. r. 11; Griffith and Loveland's Pr. pp. 232, 233.

(*o*) It has been considered best to notice this here, although it might have been treated of in Chap. III. as an interlocutory proceeding, as a sale may be directed by some interlocutory order. The proceedings however are in both cases identical, only if there is a separate order directing a sale a separate summons to proceed thereon must be issued first. When directed by a judgment the general summons to proceed will serve.

(*p*) As to these officers, see ante, p. 17.

auctioneer, on an affidavit of his fitness, and on his giving security (usually a bond with two sureties), and settles his remuneration; he then fixes the reserved biddings, being guided in so doing by the affidavit of a surveyor, and these reserved biddings are sealed up and delivered to the auctioneer, not to be opened until the time of the sale. After the sale the auctioneer makes an affidavit of the result of the sale, and from this the Chief Clerk makes his certificate thereof. The auctioneer pays the deposit received by him into Court, and the balance of the purchase-money is paid into Court by the purchaser under an order obtained by him by a day named in the conditions of sale; after the payment in, the conveyance to the purchaser is executed and the matter completed. If any disputes arise on the form of the conveyance they may be disposed of in Chambers in the action (*q*).

(*q*) Daniel's Ch. Pr. pp. 1148–1187.

CHAPTER III.

INTERLOCUTORY PROCEEDINGS.

In Part II, Chapter IV., under the same heading as this chapter, various interlocutory proceedings have been dealt with which are applicable not only to the Queen's Bench, Common Pleas, and Exchequer Divisions, but equally to the Chancery Division—such, for instance, as discovery. The interlocutory proceedings mentioned in the present chapter are those that would more usually only occur in the Chancery Division.

In the first place, it should be observed that every judgment directing accounts and inquiries always reserves liberty to the parties to apply in Chambers as they may be advised; but besides this, interlocutory applications may be made before there is any judgment. Interlocutory applications are made either by petition, motion, or summons. A petition is a written application to the Court containing a statement of facts, and praying for a certain order. If to be heard before the Master of the Rolls, it is lodged with his secretary, and if before either of the Vice-Chancellors, with the Lord Chancellor's secretary. Every petition states at its foot the names of the persons on whom it is proposed to serve it, who are called the respondents. The petition being presented, the secretary writes on it a direction for the parties to attend on the day appointed for its hearing, which is called the fiat, and a copy of the petition with this fiat thereon is served on the solicitors for the respective respondents two clear days before the day appointed for hearing. Counsel are then instructed and it comes on to be heard in

Petitions.

due course, when the Court makes such order as may be just (*r*). It is a rule that all unopposed petitions are heard prior to those which are opposed.

Motions.

A motion is an application made to the Court without any written statement. A notice of motion is served upon the other parties to the action two clear days before the intended motion, stating that on the day therein named counsel will apply to the Court for a certain order, the effect of which is shortly stated. Counsel are then instructed on both sides, and the motion is in due course made (*s*). A motion is sometimes made *ex parte*, that is, on the application of one party without service of notice on any other party; but this only occurs usually when the matter is of some very pressing nature. For instance, if an injunction is sought against some act, directly the writ is issued the plaintiff may apply *ex parte* for an interim injunction until he has time to serve the defendant with notice of motion. An *ex parte* injunction will only be granted on affidavits shewing some very pressing case. All *ex parte* injunctions are necessarily interim or interlocutory injunctions; in fact all injunctions granted otherwise than at the hearing of the cause are interlocutory in their nature, the perpetual injunction being granted at the hearing.

Ex parte motion.

When application to be by petition and when by motion.

There does not appear to be any fixed rule when an application should be made by motion and when by petition, but it may be stated, as a general rule, that when any long or intricate statement of facts is required, the application should be by petition, whilst in other cases a motion is sufficient (*t*).

Summons.

A summons is a written application made in the Judge's Chambers. The summons being prepared, it is

(*r*) Daniel's Ch. Pr. pp. 1451–1461.
(*s*) Ibid. pp. 1437–1451.
(*t*) Ibid. p. 1434.

taken to the Judge's Chambers, where a day for its hearing is filled in and it is sealed. At its foot it is addressed to all necessary parties, and must be served on the respective solicitors two clear days before the day of hearing. It then comes on to be heard before the Chief Clerk in Chambers (*u*), when the solicitors appear before him and he deals with it. If any party is dissatisfied with the Chief Clerk's decision on the summons, the Chief Clerk adjourns it to the Judge, who attends in Chambers on certain days for the purpose of hearing such cases, and he then deals with it, or he may adjourn it into Court to be there argued by counsel. Very many applications may equally be made by petition or summons, it being a point of discretion whether the matter is of sufficient importance for a petition, *e.g.*, applications for payment out of Court of money. Ordinary instances in which a summons would always be used, would be applications for time to deliver any pleading, or do any act required to be done, or applications for discovery.

Drawing up of orders.

Orders made on petitions, motions, or summonses have to be drawn up in the same way as already pointed out as to a judgment (*v*), except that in the case of an order on summons there are of course no briefs, nor has the Registrar been present. The Registrar is here furnished with the materials for drawing up the order from the Chief Clerk's indorsement on the back of the summons. Some orders also of an unimportant nature, such as orders for time, are drawn up in the Chief Clerk's Chambers without having recourse to the Registrars at at all.

Orders of course.

For some things orders are granted as of course. These orders may be obtained by *ex parte* motion or petition of course, but the usual practice is by the petition, which is simply lodged with the secretary of

(*u*) It is the practice in some of the Judges' Chambers to have summonses of a less important character heard before one of the junior clerks.
(*v*) Ante, p. 96.

the Master of the Rolls, and without any hearing the order is drawn up as asked. Instances of these orders of course are orders to tax solicitors' bills (*w*), orders for the appointment of guardians to infant defendants (*x*), or orders for a married woman having a separate interest to defend separately from her husband (*y*).

Evidence on interlocutory applications.

Upon all interlocutory applications the evidence is by affidavit, which need not be confined to such facts as the witness is able of his own knowledge to prove, as is the case in affidavits at the hearing of the action (*z*), but statements as to the deponent's belief, with the grounds thereof, may be admitted. The Court or a Judge may, on the application of any party to an action, order the attendance for cross-examination of any person making any affidavit (*a*).

Interlocutory accounts and inquiries.

Although, as has been shewn (*b*), all necessary accounts and inquiries are ordered by the judgment, yet, for the sake of expedition, interlocutory accounts and inquiries may be directed, for the Court or a Judge may at any stage of the proceedings order any which appear necessary to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the action should proceed in the ordinary way (*c*). In addition, any party to an action may at any stage apply to the Court or a Judge for such order as he may upon any admissions of fact in the pleadings be entitled to, without waiting for the determination of any other question between the parties (*d*). Such an order is known as an anticipatory judgment.

Anticipatory judgments.

(*w*) Ante, p. 90.
(*x*) Ante, p. 25.
(*y*) Ib. As to orders of course, see Daniel's Ch. Pr. pp. 1436–1451.
(*z*) Ante, p. 95.
(*a*) Order XXXVII.
(*b*) Ante, p. 96.
(*c*) Order XXXIII.
(*d*) Order XL. r. 11

Receiver.

An application that is often made to the Court is for the appointment of a receiver, *e.g.*, to get in outstanding property, or receive the rents and profits of any property under the jurisdiction of the Court. Any receiver who is appointed has to give security, which it usually a recognizance with two sureties conditioned in double the amount of the outstanding property he has to get in, or double the amount of the annual rents he has to receive. The recognizance is made out to the Master of the Rolls and the senior Vice-Chancellor. The practice to obtain the appointment of a receiver is to apply to the Court by motion, supported by affidavit of the fitness of the person proposed to be appointed; the recognizance is afterwards approved in Chambers. The duties of a receiver are to act according to what he is appointed for, and from time to time to pass his accounts (which are vouched in Chambers), and pay the balances into Court as directed by the order appointing him. When a receiver's duties are ended, the recognizance entered into on his appointment should be vacated (*e*).

Preservation of property.

Beyond the appointment of a receiver, an order may be made for the preservation or interim custody of any property the subject of a pending action, or for it to be brought into Court or otherwise secured; and if any property is of a perishable nature, or for other reasons it appears desirable, an order may be made for its sale (*f*).

Payment into Court.

Applications for payment into Court are invariably made when a party has in his hands certain moneys, the subject of the action. For instance, if an executor or administrator in his pleading admits that he has a certain sum in hand on account of the estate, the proper course is to at once take out a summons for payment of such sum into Court. The payment

Mode of payment in.

(*e*) As to receivers generally, see Daniel's Ch. Pr. pp. 1563–1618.
(*f*) Order LII. rr. 1–3.

into Court is effected by lodging the order at the Registrar's office, where formal directions are given to the Bank of England to receive the money in accordance with the order. The directions are then taken to the Bank, and the money is paid in and duly carried to the credit of the action, or the credit of any particular account directed by the order, in the books of the Paymaster General. If the order does not direct an investment of the money, it is simply placed on deposit at the Bank; but if an investment is directed, the order is, after the payment in, left at the Paymaster General's office and the investment bespoken.

Investment.

Certificate of fund.

If in the course of an action evidence is required by any party to it, of what money is in Court, a certificate of fund may be obtained from the Paymaster General's office.

Application where defendant sets up a lien on property.

If in any action brought to recover certain property the defendant sets up a lien thereon for a certain sum of money, the plaintiff may at once take out a summons to be at liberty to pay into Court, to abide the result of the action, the amount of such lien, and any further sum that may be directed for interest or costs, and that upon such payment in, the property may be given up to him (*g*).

Ne exeat regno.

An application is sometimes made for a writ of *ne exeat regno*. This is a writ which issues to restrain a person from going out of the kingdom without the license of the Sovereign or of the Court (*h*). It is, in general, issued only where the claim is of an equitable nature, *e.g.*, to prevent a trustee from going abroad. To take this instance, if a *cestui que trust* has reason to believe that his trustee, who has not accounted to him, is going abroad without accounting, he may issue a writ against him for an account, and then immediately

(*g*) Order LII. r. 6.
(*h*) Daniel's Ch. Pr. p. 1548.

apply to the Court *ex parte* by motion for this writ, which will be granted on due cause shewn by affidavits (*i*).

Stop order.

In the course of an action in this Division money is frequently paid into Court to be dealt with by the Court in the action, and when persons have successive interests in it, *e.g.*, if the income of the fund is given to one for life, and then the *corpus* to some other person or persons, it usually remains in Court until the happening of this ultimate event. In such cases it often happens that a beneficiary charges or disposes of his interest to some person, and, if so, to perfect the charge or disposition in his favour, he should obtain a stop order. This is an order preventing any fund in Court being paid out or otherwise dealt with without notice to the applicant. If the party against whose interest the stop order is desired consents, the application for it may be by summons in Chambers, but if not it must be by petition to the Court (*j*).

Summons for conduct of cause.

If a plaintiff does not proceed with due diligence in prosecuting the accounts and inquiries in Chambers, or generally in bringing the action to a conclusion, an application may always be made by any party to take the conduct of the proceedings away from him, and give it to the applicant (*k*).

Application for leave for ward of Court to marry.

If any person who is a ward of Court is desirous of contracting marriage, an application for leave to marry must be made. The application is made by petition, stating (1), the age of the ward; (2), the nature and amount of his or her fortune; and (3), the contemplated marriage, and the age, rank, position, and fortune of the person to whom the infant is proposed to be

(*i*) Daniel's Ch. Pr. pp. 1548–1562.
(*j*) Ibid. pp. 1543–1547. A distringas, or a restraining order, cannot be treated of in this chapter, as they are not interlocutory proceedings in an action. As to them see post, Chap. V. pp. 131, 132.
(*k*) Daniel's Ch. Pr. pp. 1082–1084.

married, and praying for an inquiry whether the marriage is a proper one. The order made on the petition refers the matter to Chambers, where—the Chief Clerk being first satisfied of the fitness of the match—the settlements are considered, settled, and approved, and an order is ultimately made that on the execution of the settlements the parties be at liberty to marry (*l*).

(*l*) Daniel's Ch. Pr. pp. 1206–1214. As to a petition under 18 & 19 Vict. c. 43, see post, p. 126.

CHAPTER IV.

PROCEEDINGS TO CONCLUSION.

In Chapter II. of this part, the proceedings in Chambers under the judgment were considered to their conclusion, that conclusion being the Chief Clerk's certificate (*m*). We have now to consider the proceedings subsequent to this to their close.

Further consideration always reserved.

Every judgment directing accounts and inquiries to be taken and made, always reserves the further consideration of the action; for it is evident that after the accounts and inquiries have been proceeded upon before the Chief Clerk in Chambers, and he has made his certificate, the cause must again come before the Court to be finally disposed of, for the Chief Clerk's certificate only certifies a number of facts, and it is for the Court subsequently to act on these facts as found by the Chief Clerk. This being so, it is manifestly of great importance that the Chief Clerk should have accurately certified the facts; and that this should be so to the fullest extent, there exists the power of taking the opinion of the Judge on the certificate, or applying to vary it, as has been already detailed (*n*).

Cause set down on further consideration.

The step to bring the action to a conclusion, is to set it down for final hearing, or, as it is called, for hearing on further consideration. At this hearing the practice is in general the same as on the original hearing (*o*), but no further evidence than the certificate

(*m*) Ante, pp. 103–105.
(*n*) Ante, pp. 103, 104.
(*o*) Ante, p. 96.

as to matters directly in issue in the cause will be received, but the Court will draw conclusions from statements in the certificate. Any matters not directly in issue may, if the Court thinks proper, be proved by affidavit (*p*).

Judgment on further consideration.

The Court will, when possible, give a final judgment on this hearing on further consideration, declaring the rights of the parties, dealing with the whole property the subject of the action, and directing the taxation and payment of costs. In some cases, however, to at once finally dispose of the whole action is impossible, for there may be further matters necessary to be inquired into, and when this is so the action will be disposed of only as far as it can be up to that time; any further accounts and inquiries that appear necessary or advisable will be directed, and as to them the cause will stand in the same position as originally; that is to say, these further accounts and inquiries will have to be proceeded with in Chambers; a further Chief Clerk's certificate obtained; and there will be then another hearing on further consideration.

When cause cannot be finally disposed of.

Parties and property remaining under control of the Court.

And even although the action may not require any further accounts and inquiries, or any further actual hearing, yet in many cases it is necessary that the Court should retain control over persons and property, *e.g.*, where there are infants, wards of Court, or where there is a fund in Court on which the dividends have to be paid to certain persons, and ultimately the *corpus* to others. In all such cases as this the judgment on further consideration reserves liberty to apply, so that on any point that may be necessary the parties may from time to time apply to the Court in the existing action.

Hearing on further consideration as a short cause.

An action may be heard on further consideration as a short cause under the same circumstances and in the

(*p*) Daniel's Ch. Pr. pp. 1228, 1229.

same manner as has already been pointed out with regard to the original hearing (*q*). The judgment also, when pronounced, is drawn up, settled, passed, and entered also in a similar manner (*r*). Drawing up, &c. of judgment.

The next thing to observe on is the enforcement and carrying out of the judgment. On further consideration, in some cases it may direct money to be paid by one of the parties, and the different modes of enforcing such a judgment as this have already been pointed out (*s*) ; in other cases it may direct some act to be done by one of the parties other than payment of money, and here again the modes of proceeding have been pointed out (*t*), but the process of attachment for contempt of Court is, however, of more constant occurrence in this than in the other Divisions. Enforcement and carrying out of judgment.

An application for an attachment is made to the Court by motion, of which notice must be duly served personally upon the party sought to be attached. In support of the motion it must be shewn that the judgment or order directing the doing or non-doing of the act in respect of which the attachment is sought was served upon the person, or in some way brought to his knowledge, and that there has been a breach of it. Upon this contempt being shewn the party will, unless he can shew some good excuse, be committed to prison. How long he remains there is a matter of discretion with the Court, but he is usually allowed to clear his contempt by doing, or undertaking to do, or not to do, the act in question, as the case may be, and paying the costs incurred by his disobedience. This is called purging or clearing his contempt. Attachment for contempt of Court.

In some cases there may be money in Court, which is dealt with by the judgment on further consideration. Dealing with money in Court.

(*q*) Ante, p. 97.
(*r*) Ante, pp. 96, 97.
(*s*) Ante, pp. 81, 82.
(*t*) Ante, p. 84.

In such a case, if in cash, it may simply be directed to be paid to the party or parties entitled, or if invested in stock the stock may be directed to be transferred to such party or parties, or it may be directed to be sold, and the proceeds of such sale so paid. When cash in Court is directed to be paid out, a cheque is obtained by simply leaving the judgment or order at the office of the Paymaster General and bespeaking it, and it will be usually ready after the lapse of two or three days. The party to receive the money then attends with his solicitor, who identifies him as the person named in the judgment or order, and he receives his cheque. Where stock is to transferred or sold, directions to this effect are bespoken at the Registrar's office in the first instance, which is done by simply leaving the judgment or order there. The directions when obtained are taken, together with such judgment or order, to the Paymaster General's office, and the transfer or sale is effected, and in this latter case a cheque obtained as above detailed.

Identification on receiving money out of Court.

Costs.

We have said that the judgment on further consideration usually deals with the question of costs. Sometimes by it the costs are directed to be paid by one of the parties, but in a very great number of cases they are ordered to be paid out of some fund in Court. The general subject of costs has already been considered (*u*), and it is not therefore necessary to add much here, but the student should be reminded that as there is not usually any issue tried by a jury in this Division, it is necessary for the Court to give a direction as to costs, and costs are in the discretion of the Court (*v*).

Taxation.

The proceedings to tax costs in this Division are of a more formal and lengthy character than in the Queen's Bench, Common Pleas, and Exchequer Divi-

(*u*) Ante, Part II. Chap. V. pp. 87–90.
(*v*) Order LV., ante, p. 87.

sions (*x*), on account of the different class of cases involved—a reason which indeed accounts for nearly all differences in practice in the Divisions — for, as a Chancery action generally necessarily lasts much longer than one in the other Divisions, and naturally the bills of costs therefore are usually much heavier, it is unfortunately impossible that they can be disposed of in the same summary way as they can be there (*y*).

Proceedings on taxation.

The proceedings to taxation in the Chancery Division are as follows:—The plaintiff's solicitor certifies on the original judgment or order directing taxation that it has not already been referred to any Taxing Master, and leaves it with one of the Taxing Masters, who is called the sitting Master of the day. He refers it to one of the Taxing Masters for taxation, and in any future taxation of costs in the same action no fresh reference is necessary, but it will take place before the same Master. The solicitor then leaves a copy of the judgment with the Taxing Master, and informs the different solicitors who he is. The solicitors then prepare and leave their costs, with all necessary vouchers, and on leaving them a memorandum of their being left, called a warrant on leaving, is issued and served on the other solicitors. All the bills to be taxed being left, the plaintiff's solicitor procures an appointment and issues a warrant to tax, being a memorandum

Warrant on leaving.

Warrant to tax.

(*x*) As to which, see ante, p. 89.

(*y*) The Author cannot, however, help observing that the time often—in fact usually—taken to tax solicitors' bills in Chancery taxing offices is much to be regretted. He does not mean simply because solicitors are delayed in getting payment, but because thereby suitors are very often seriously delayed and injured. For instance, the costs of an action may be directed to be taxed and paid out of a fund in Court, and the *residue* paid to the party or parties entitled thereto. Of course this residue cannot be ascertained and paid until the costs are taxed, and the taxation sometimes takes months, as through pressure of business the Taxing Master to whom the taxation is referred may be unable to give any appointment to tax the bills for some considerable time. This state of things is no doubt only to be remedied by the appointment of additional Taxing Masters, and it is to be hoped the necessity of doing so will soon be fully recognised.

containing a note of the appointment, and this is served on the other solicitors. The appointment is then attended, and the bills being taxed and completed, the Master gives his certificate of taxation, in which he certifies what is the amount of each party's costs. If these costs are ordered to be paid out of a fund in Court, the judgment and the certificate of taxation are taken to the Paymaster General's office, and the cheques bespoken and received in the ordinary way.

Certificate of taxation.

Reviewing taxation.

If any party is dissatisfied with the taxation of the costs he is entitled to bring the point before the Court or a Judge at Chambers. The course to obtain this review of the taxation is to carry in objections in writing to the Taxing Master before he gives his certificate, and afterwards, when the certificate is filed, to take out a summons for an order to review (*z*).

County Courts jurisdiction.

It should be noticed that the County Courts have a general jurisdiction in matters of an equitable character, where the matter in dispute does not exceed £500 in value. They have, however, no jurisdiction to entertain an action for an injunction, though they may grant an injunction as incidental to other matters in which they have jurisdiction (*a*). There is no absolute rule that because the matter in dispute does not exceed £500 proceedings should be brought in the County Court.

(*z*) Daniel's Ch. Pr. pp. 1317–1319.

(*a*) 28 & 29 Vict. c. 99; 30 & 31 Vict. c. 142, s. 9; 31 & 32 Vict. c. 40, s. 12. As to their jurisdiction in matters coming within the Queen's Bench, Common Pleas, and Exchequer Divisions, see ante, p. 88.

CHAPTER V.

OF CERTAIN SPECIAL PROCEEDINGS.

It has been stated (*b*) that in some cases proceedings may be commenced by petition, motion, summons, and special case. These require to be noticed, as also do one or two other special proceedings.

Petitions.

A petition, when dealing with it as an interlocutory proceeding, we defined as a written application to the Court containing a statement of facts and praying for a certain order (*c*). The same definition is equally applicable to a petition as a means of commencing proceedings, except that here it is specially allowed by the provisions of some statute.

A petition under the statutory jurisdiction of the Court is intituled or headed in the matter of the Act of Parliament under which the petition is presented, and also in the matter of the particular trust, or property, or person to which it relates (*d*). As has already been stated with regard to interlocutory petitions (*e*), if the petition is to be heard before the Master of the Rolls it is lodged with his secretary, and if before either of the Vice-Chancellors with the Lord Chancellor's secretary. Every petition states at its foot the names of the persons on whom it is proposed to serve it, and they are called the respondents. The petition being presented, the secretary writes the fiat (*f*) on it.

(*b*) Ante, p. 92.
(*c*) Ante, p. 107.
(*d*) Daniel's Ch. Pr. p. 1452.
(*e*) Ante, p. 107.
(*f*) Ante, p. 107.

The petition is not usually signed by counsel. If any parties to it are under disability, the same rules apply as in the case of parties to an action being under disability.

Service of petition.

Service of the petition is effected by delivering to the person to be served a true copy of the petition with the foot-note and the fiat thereon, and at the same time shewing him the original (*g*). The rules generally as to service of a writ in an ordinary action apply to service of a petition (*h*). At least two clear days must elapse between the service of the petition and the day appointed for its hearing; and generally the same rules apply as to the hearing and subsequent drawing up and perfecting of the order as have already been detailed in considering interlocutory petitions (*i*).

We will now proceed to notice some particular instances of proceedings commenced by petition under the Statutory Jurisdiction of the Court:

Legacy Duty Act.

1. *Petitions under the Legacy Duty Act* (*j*).—Where any person who is an infant or beyond seas is entitled to any legacy or the residue of any personal estate chargeable with legacy duty, the executor or administrator may, after deducting the duty, pay or transfer the same into Court to the account of the person or persons for whose benefit the same is so paid or transferred. The money paid in is invested and the dividends accumulated. The person or persons entitled may obtain payment out of Court by an *ex parte* petition in a summary way on proper proof of identity; and if paid in on account of infancy, on proof also of having attained full age. The payment into Court under this

(*g*) Daniel's Ch. Pr. p. 1455.
(*h*) Ante, pp. 31–34.
(*i*) Ante, pp. 107–109.
(*j*) 36 Geo. 3, c. 52.

Act of a legacy belonging to an infant does not constitute the infant a ward of Court (*k*).

The application may, instead of being by petition, be by *ex parte* motion, or if the sum paid or transferred into Court does not exceed £300 cash or £300 stock it may be by *ex parte* summons at Chambers.

Petitions under Lands Clauses Consolidation Act, 1845.

2. *Petitions under the Lands Clauses Consolidation Act*, 1845 (*l*).—Prior to this Act every company authorized by Act of Parliament to acquire lands for undertakings or works of a public nature included in its special Act the powers and provisions which were necessary to enable the company to take such lands; but by this Act the usual provisions were consolidated therein, and were made applicable to all future undertakings authorized by statute, except so far as they might be varied or excepted by the special Act (*m*).

The special particular in which we require to notice this Act is in the case of land being taken in which persons who are under some disability are interested. In such cases the value of the property is arrived at by two surveyors, one nominated by the promoters of the undertaking and the other by the other party, and if they differ, by a third surveyor appointed by two justices on the application of either party after notice to the other.

Dealing with money.

The amount of the purchase-money being thus ascertained, it is paid into the Bank with the privity of the Paymaster General of the Court, and placed to a proper account there, and invested in consols until it can be applied to one of the following purposes, viz.:—(1) the purchase or redemption of the land tax, or discharge of any debt or incumbrance affecting the land in

(*k*) Daniel's Ch. Pr. pp. 1911–1914.
(*l*) 8 & 9 Vict. c. 18, amended by 23 & 24 Vict. c. 106.
(*m*) Daniel's Ch. Pr. p. 1861.

respect of which the money has been paid, or affecting other land settled to the same uses or trusts; (2) in the purchase of other lands to be settled to the same uses or trusts; (3) if the money is in respect of any buildings, in removing or replacing such buildings, or substituting others in their stead; or (4) in payment to any person becoming absolutely entitled.

Instances of petitions under this Act.

Petitions under this Act are frequent, for—the money being simply paid into Court as above-mentioned,—at first, perhaps, a temporary investment may be required, then another investment, and finally payment out of Court to the person absolutely entitled. To accomplish each of these objects, different petitions have to be presented, and the costs of all such petitions, if proper under the circumstances, fall upon the company.

Course where purchase-money under £200 and £20 respectively.

It should be mentioned that if the purchase-money does not amount to £200, instead of being paid into Court as just mentioned, it may be paid to two trustees to be nominated on behalf of the persons entitled in the manner pointed out by the Act, and if the money does not exceed £20 it may instead be paid to the husband, guardian, committee, or trustee of the person entitled to the rents and profits of the lands taken.

Trustee Relief Acts, 1847 and 1849.

3. *Petitions under the Trustee Relief Acts*, 1847 *and* 1849 (*n*).—The object of these Acts is to afford to persons standing in the position of trustees a means, in the event of disputes arising, as to who is entitled to trust funds held by them, of determining the point without running the risk they would necessarily do in paying the money over simply on their own judgment.

Payment into Court.

The course to be taken under these Acts is for the trustee seeking relief to file an affidavit giving his name and address, and an address for service, particu-

(*n*) 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74.

lars of the trust funds, a short description of the trust, the names and descriptions of all persons interested to the best of his knowledge, and submitting to the jurisdiction of the Court. If it is deemed unnecessary to have the money invested in the meantime, the affidavit should also contain a statement to that effect, otherwise, on payment into Court, it will be invested. On production of an office copy of this affidavit, the money or stock may be paid or transferred into Court without any order for that purpose. If there are several trustees, the payment or transfer in may be made by the majority of them, and if any difficulty arises through the disagreement on the point of payment or transfer into Court, where there are several trustees the Court may order it to be done on the petition of the major part of the trustees. Any person who becomes by force of circumstances a trustee, is a trustee within the meaning of these Acts, and may take advantage of their provisions, *e.g.*, a mortgagee who has sold under his power of sale, and has a balance in his hands after payment of his principal, interest, and costs.

Notice of payment or transfer into Court.

The payment or transfer into Court having been made, notice is given by the trustee to the different persons mentioned in his affidavit. One or more of these persons then presents a petition asking for the fund to be dealt with and disposed of as he contends it should be; this petition is served on the trustee and all persons interested, and in due course comes on to be heard, when the matter is disposed of.

Petition.

It is usual for a trustee paying money into Court under these Acts to deduct therefrom, in the first instance, the costs of his so doing (*o*).

4. *Petitions under the Trustee Acts,* 1850 and 1852 (*p*).

Trustee Acts 1850 and 1852.

(*o*) See hereon Daniel's Ch. Pr. pp. 1784–1797.

(*p*) 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55, which are to be construed as one Act.

Under these Acts a petition may be presented for the appointment of new trustees, and for the vesting of any property in them, or simply for an order vesting any property in any person, called a vesting order. Any petition for the appointment of new trustees must be supported by evidence shewing the willingness of the intended new trustee to act, and of his fitness. The former point is proved by the verification of his written consent, and the latter point by the evidence of some person acquainted with him. The affidavit of fitness must not be made by the solicitor of any of the parties. In addition to this, the nature of the trust, the persons interested in it, and the reasons of the application, have to be shewn by affidavit (*q*). Any order made under these Acts dealing with a legal estate is liable to the same stamp duty as would have been payable if the same matter had been by deed.

Vesting order.

Infants Marriage Settlement Act.

5. *Petitions under the Infants Marriage Settlement Act* (*r*).—Under this Act, on petition, a binding marriage settlement may be allowed by the Court, in the case of a male infant at the age of twenty years, and in the case of a female infant at the age of seventeen years. The statute does not extend to powers of appointment as to which it has been expressly declared that they shall not be executed by an infant, and in case of any appointment under a power, or any disentailing assurance executed by an infant under this Act, it only takes effect if he afterwards attains full age.

On the hearing of the petition the matter is referred to Chambers, the proceedings being much the same in detail as have already been given in the case of the marriage of an infant ward of Court (*s*). If the infant, however, is not a ward of Court, the Court is not

(*q*) Daniel's Ch. Pr. pp. 1798–1832.
(*r*) 18 & 19 Viet. c. 43.
(*s*) Ante, p. 113.

bound to inquire into the propriety of the proposed marriage, but only into the propriety of the proposed settlement; however, what would be a proper settlement in any particular case must necessarily often lead to an inquiry of all the circumstances connected with the proposed marriage (*t*).

Petitions for opinion of Court.

6. *Petitions for the Opinion of the Court under Lord St. Leonards' Act* (*u*).—Under the provisions contained in this Act any trustee, executor, or administrator may apply for the opinion, advice, or direction of the Court on any question touching the management or administration of the trust property or the assets of the testator or intestate. The petition is served on all persons interested, and if the trustee, executor, or administrator acts upon the opinion, advice, or direction given, that exonerates him from further responsibility, unless he has been guilty of any fraud, wilful concealment, or misrepresentation in obtaining such opinion, advice, or direction.

Scope of such petitions.

Questions of construction cannot be decided by a petition under this provision; it is confined to matters of administration (*x*). A petition under this Act requires to be signed by counsel. The application, instead of being by petition, may be a summons in Chambers founded on a written statement of facts, which statement must be signed by counsel.

Petitions under Leases and Sales of Settled Estates Act.

7. *Petitions under the Leases and Sales of Settled Estates Act* (*y*).—Petitions may, under this Act, be presented for the purpose of getting a lease or a sale of a settled estate which could not otherwise be leased or sold on account of its being in settlement. The student is referred to the Act itself.

(*t*) Daniel's Ch. Pr. p. 1213.
(*u*) 22 & 23 Vict. c. 35, s. 30, amended by 23 & 24 Vict. c. 38, s. 9.
(*x*) Daniel's Ch. Pr. p. 1943
(*y*) 40 & 41 Vict. c. 18.

Winding up of companies.

8. *Petitions to wind up Companies under the Companies Acts*, 1862 *and* 1867 (*z*).—There are various grounds for presenting petitions praying that a company may be ordered to be wound up, viz: (1.) That the company has specially resolved to wind up under the jurisdiction of the Court; (2.) That it has not begun, or has suspended business for a year; (3.) That its members are reduced to less than seven; (4.) That it is unable to pay its debts; and (5.) It may be ordered to be wound up if it can be shewn to the Court that it is just and equitable that it should be wound up (*a*). The petition to wind up being presented must be advertised seven clear days before the hearing, once in the *London Gazette*, and if the company's registered office is within ten miles of Lincoln's Inn Hall, once in the London daily morning newspapers, or if not within this distance, then once in two local newspapers of the district. At the hearing of the petition, the necessary facts being proved, and no satisfactory cause shewn to the contrary, the order to wind up is made. Any creditors or shareholders are entitled to appear on the hearing of the petition, and if the order to wind up is made, and they have supported the winding-up, they get their costs out of the company's assets; if the order is refused, then those creditors or shareholders who have opposed the winding-up of the company get their costs against the person or persons presenting the petition. Every separate shareholder or creditor who appears does not get a separate set of costs, but one set of costs only is allowed for shareholders, and one set of costs for creditors.

Grounds for petition.

Proceedings in Chambers after order to wind up.

The order to wind up having been made and duly drawn up, passed, and entered, it is carried into Chambers and an official liquidator is appointed by the Chief Clerk. His duties are to get in the company's assets

(*z*) 25 & 26 Vict. c. 89, and 30 & 31 Vict. c. 131.
(*a*) 25 & 26 Vict. c. 89, s. 79; 30 & 31 Vict. c. 131, ss. 40, 41.

and generally to act in bringing the administration thereof to a close (*b*). With regard to unpaid calls, he brings into Chambers two lists of persons who are liable thereon, who are called contributories. These lists are styled respectively the A list and the B list; the A list containing the names of those shareholders who are members of the company at the date of the order to wind up, and the B list containing the names of those who were not then members but who had not ceased to be members for one year prior to the date of the winding-up order, and to these latter recourse can be had if, after exhausting the liability of the former, there are still debts or liabilities of the company undischarged. The shareholders in the B list are not, however, liable for debts of the company contracted after they ceased to be members (*c*).

Motions.

The definition already given of a motion, when treating of it as an interlocutory proceeding, viz., an application made to the Court without any written statement (*d*),—is equally applicable to a motion as a means of commencing proceedings. However, such a motion is not of constant occurrence; an instance of it would occur in the enforcing of an agreement for the remuneration of a solicitor under the Solicitors' Remuneration Act, 1870 (*e*).

Summonses.

A summons we have previously defined as a written application made in a Judge's Chambers (*f*), which definition is equally applicable to a summons as a mode of commencing proceedings. Summonses originating proceedings are issued in the usual way, except that in addition a duplicate must be filed at the Record and Writ Clerk's Office, and a sealed copy of the sum-

(*b*) See his powers detailed in 25 & 26 Vict. c. 89, s. 95.
(*c*) 25 & 26 Vict. c. 89, s. 38.
(*d*) See ante, p. 108.
(*e*) 33 & 34 Vict. c. 28, s. 8.
(*f*) Ante, p. 109.

mons must be served. This service must be made seven clear days before the day of the return of the summons. There are two very important cases of summonses originating proceedings which we will now notice.

Administration summons.

1. *Summonses for the Administration of the Estate of deceased Persons* (*g*).—An originating summons for this purpose may be issued by any person claiming to be interested either as creditor, legatee, or next of kin, against the executor or administrator for the administration of the personal estate of the deceased, or of any real estate devised to trustees in trust to sell. The summons is intituled in the matter of the deceased person, and between the applicant as plaintiff and the executor or administrator as defendant. The hearing takes place in Chambers, and on account of this the proceedings are usually less expensive and more expeditious than a regular action for the purpose. This mode of proceeding can only be had recourse to in simple cases, and provided there is no special or peculiar relief sought, *e.g.*, an executor or administrator could not be charged with wilful default on such a summons (*h*).

Guardianship and maintenance summons.

2. *Summonses for Guardianship and Maintenance* (*i*). —The object of such an application as this is to have a guardian appointed to some infant, and to obtain an allowance for the infant's support. The summons is intituled in the matter of the infant, and is disposed of at Chambers. In support of it, evidence must be given of the age of the infant; the nature and amount of his fortune and income; what relations he or she has, and the fitness of the proposed guardian (*k*).

Special case.

A *Special case*, as a means of commencing pro-

(*g*) 15 & 16 Vict. c. 86, s. 45.
(*h*) Daniel's Ch. Pr. pp. 1071–1076.
(*i*) 15 & 16 Vict. c. 80, s. 26.
(*k*) Daniel's Ch. Pr. pp. 1189–1206.

ceedings, is rarely used. It occurs where the parties are agreed on the facts, and simply want a declaration of the Court on a point of law, and nothing beyond this. It is allowed under the Statute 13 & 14 Vict. c. 35 (*l*).

Distringas.

A writ of distringas is a writ issued for the purpose of restraining the transfer of some fund not in Court, or the payment of the dividends thereon (*m*). It does not only apply to stock in the Bank of England, but in any other public company (*n*). It may be issued out of any office in London where writs of summons are issued (*o*).

Mode of obtaining.

The mode of obtaining this writ is for the applicant to make an affidavit specifying the particular fund, and in whose name it is standing, and upon this the writ issues. It is then served on the Bank of England or other public company, together with a notice that its object is to prevent the transfer of the stock therein mentioned, and the payment of the dividends thereon, or as the case may be.

Effect of distringas.

The effect of the distringas is not absolutely to prevent any dealing with the stock in question, but that, on any application being made to deal with it, notice is given to the person who has issued the distringas. If that person does nothing further within eight days, the distringas no longer has any effect, but within this period such person may commence an action, and in it obtain an injunction against dealing with the stock in question (*p*).

Restraining order.

A restraining order is closely allied to a distringas. It is an order obtained *ex parte* on motion or petition

(*l*) See hereon Daniel's Ch. Pr. pp. 1701–1711. As to a special case stated in the course of an action, see ante, p. 68.
(*m*) 5 Vict. c. 5, s. 5.
(*n*) Daniel's Ch. Pr. p. 1540.
(*o*) Order XLVI. r. 2.
(*p*) See Daniel's Ch. Pr. pp. 1540–1543.

in a summary way, without any regular action being commenced, on evidence that the applicant is interested in a certain fund in the Bank of England or other public company, and that it is about to be wrongfully dealt with. It has the same effect as an injunction, but is only intended for interim purposes, and an action should afterwards be commenced, and an injunction obtained therein in the ordinary way. There does not therefore seem to be much, if any, object to be gained by applying for a restraining order, but it is better to at once commence an action, and apply therein for an injunction (*q*).

(*q*) 5 & 6 Vict. c. 5, s. 4. Daniel's Ch. Pr. pp. 1537–1540.

PART IV.

OF APPEAL.

CHAPTER I.

APPEALS TO HER MAJESTY'S COURT OF APPEAL (*a*).

Time for appealing.

ALL appeals to Her Majesty's Court of Appeal from interlocutory orders must be brought within twenty-one days, and appeals from other orders within one year, unless special leave is given to bring the appeal after these times (*b*). The time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the Companies Acts 1862 and 1867; or any order or decision made in the matter of any bankruptcy; or in any matter not being an action (*c*), is the same as the time limited for appeal from an interlocutory order (*d*). Where an *ex parte* application to the Court below has been made and refused, an application to the Court of Appeal for a similar purpose must be made within four days from the date of such refusal (*e*). Leave to bring an appeal after these times will only be granted on shewing some special circumstances (*f*). The period within which to appeal is calculated from the time at which the judgment or order is signed, entered, or otherwise per-

(*a*) As to the constitution, &c of the Court, see ante, pp. 14, 15.
(*b*) Order LVIII. r. 15.
(*c*) As to such matters, see ante, Part. III. Ch. V.
(*d*) Order LVIII. r. 9.
(*e*) Ibid. r. 10.
(*f*) Griffith and Loveland's Pr. p. 466.

fected; or, in the case of the refusal of an application, from the date of such refusal (*g*).

Mode of appealing.

Appeals take place by way of re-hearing, and are brought by notice of motion in a summary way, and no petition, case, or other formal proceeding, except such notice of motion, is necessary. The notice of motion specifies whether the whole or part only of the judgment or order in question is appealed from, and in the latter case specifies such part (*h*). This notice of appeal—which is a fourteen days' notice if the appeal is from a judgment, and a four days' notice if from an interlocutory order (*i*)—must be served upon all parties directly affected by the appeal, and it is not necessary to serve parties not so affected; but the Court of Appeal has power to direct notice of the appeal to be served on all or any of the parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal. Any notice of appeal may be amended by leave (*k*). The party appealing is called the appellant, and the party against whom the appeal is directed, the respondent.

Length of appeal notice.

Setting down.

The notice of appeal having been given, the appeal must be set down for hearing. This is done by producing to the proper officer of the Court of Appeal the judgment or order appealed from, or an office copy thereof, and leaving with him a notice of the appeal to be filed; the officer then sets down the appeal in the list, and it comes on in its proper order to be heard (*l*). Under ordinary circumstances, no deposit has to be made, or security given, on appealing; but a deposit or other security for the costs to be occasioned by any

(*g*) Order LVIII. r. 15.
(*h*) Ibid. r. 2.
(*i*) Ibid. r. 4.
(*k*) Ibid. r. 3.
(*l*) Ibid. r. 8.

appeal may, under special circumstances, be directed by the Court of Appeal (*m*). Any application asking for a deposit or other security from the appellant, should be made immediately on receiving the notice of appeal; and as to what will constitute "special circumstances" for the Court to make such an order, the fact of the appellant being out of the jurisdiction of the Court, or in an insolvent state, or in a state of poverty, may be sufficient. However, of course, what will or will not in particular cases amount to "special circumstances" is a matter in the discretion of the Court (*n*).

No notice of cross appeal necessary.

It sometimes happens that in some points the respondent to an appeal is also dissatisfied with the judgment or order in some particular. In such a case it is not necessary for him to give notice of motion by way of cross appeal, but if he intends, upon the hearing of the appeal, to contend that the decision of the Court below should on any point be varied he must, if the appeal is from a final judgment, give an eight days' notice, and if from an interlocutory order, a two days' notice of such his intention to any parties who may be affected by such contention, and the whole matter can then be dealt with at the hearing (*o*).

Evidence on appeal.

An appeal is sometimes only on a point of law, but sometimes it is on a matter of fact. When any question of fact is involved in an appeal it is, unless some special order otherwise is made, brought before the Court of Appeal thus: (1.) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed and office copies of such of them as have not been printed. Any evidence by affidavit not printed in the Court below

(*m*) Order LVIII. r. 15.
(*n*) See various instances of applications for security on appeals, Griffith and Loveland's Pr. pp. 466–468.
(*o*) Order LVIII. rr. 6, 7.

may be ordered to be printed for the use of the Court of Appeal, and should not be printed without such order. (2.) As to any evidence given orally, by the production of a copy of the Judge's notes or such other materials as the Court may deem expedient (*p*).

New evidence on appeal.

The Court of Appeal is not necessarily restricted to the evidence used in the Court below, but has full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination of witnesses in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from judgments after trial of any cause or matter upon the merits, further evidence (except as to matters subsequent as just mentioned) is only admitted by special leave of the Court, which is only granted on shewing some special grounds (*q*).

Amendment.

The Court of Appeal has all powers as to amendment or otherwise in the same way as the Court below (*r*).

Hearing of appeal.

The appeal comes on in due course to be heard. Where the subject matter of it is a final order, decree, or judgment, the hearing must be before not less than three Judges of the Court sitting together, but when the subject matter of the appeal is an interlocutory order, decree, or judgment, the hearing may be before two Judges of the Court sitting together, and if any doubt arises as to what judgments, decrees, or orders are final and what are interlocutory, the point is determined by the Court of Appeal (*s*). No Judge of the

(*p*) Order LVIII. rr. 11, 12.
(*q*) Ibid. r. 5.
(*r*) Ibid.
(*s*) Jud. Act, 1875, s. 12.

Court of Appeal may sit as a Judge on the hearing of any appeal from any judgment or order made by himself or by any Divisional Court of the High Court of which he was a member (*t*). However, a Judge has been held to be competent to take part in an appeal from a Divisional Court of which he is a member on a case in which he was not one of the sitting Judges when it was heard in the Division (*u*). On the argument of the appeal two counsel on each side are allowed to be heard (*x*). The Court finally gives its decision, either dismissing the appeal, or discharging or varying the judgment or order complained of, and it has full power to make such order as to the whole or any part of the costs of the appeal as may seem just (*y*).

Costs on appeal.

In any cause or matter pending before the Court of Appeal any direction incidental thereto, not involving the decision of the appeal itself, may be given by a single Judge of the Court of Appeal; and a single Judge of the Court may at any time during vacation make any such interim order as he may think fit to prevent prejudice to the claims of any parties pending an appeal; but every such order made by a single Judge may be discharged or varied by the Court (*z*).

Incidental directions on appeal.

An appeal does not of itself stay execution or other proceedings under the decision appealed from; for it to have this effect application must be made to the Court appealed from or any Judge thereof, or to the Court of Appeal. Any application for a stay of execution or other proceedings should be made in the first instance to the Court below (*a*), and any such application cannot be made *ex parte*, but only on notice to the

Staying execution.

(*t*) Jud. Act, 1875, s. 4.
(*u*) Griffith and Loveland's Pr. pp. 73, 74.
(*x*) Ibid. p. 456.
(*y*) Order LVIII. r. 5.
(*z*) Jud. Act, 1873, s. 52.
(*a*) Order LVIII. rr. 16, 17.

other side, and, as a general rule, if the order is made the applicant will be put under terms (*b*).

Orders not subject to appeal.

Orders made by consent, or as to costs only, which are by law left to the discretion of the Court, are not subject to appeal, except by special leave of the Court or Judge making such order (*c*).

Bills of exception and proceedings in error.

The old processes of appeal by bills of exception and proceedings in error are abolished, and do not require any notice here.

Enrolment.

Under the old practice the enrolment of a decree or order in Chancery prevented any appeal except to the House of Lords. There is, however, now no object gained by the enrolment, for the powers of the Court of Appeal are specially vested in it by the Judicature Act, 1873 (*d*).

(*b*) Griffith and Loveland's Pr. p. 469.
(*c*) Jud. Act, 1873, s. 49. See hereon Griffith and Loveland's Pr pp. 70, 71.
(*d*) Sect. 19.

CHAPTER II.

APPEALS TO THE HOUSE OF LORDS (*e*).

Mode of appealing to House of Lords.

EVERY appeal to the House of Lords is brought by way of petition, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty in her Court of Parliament (*f*). A form of petition is given by the Orders of November, 1876, under the Appellate Jurisdiction Act (39 & 40 Vict. c. 59), and it must be signed by two counsel, who have either attended as counsel in the Court below, or purpose attending as counsel at the hearing in the House of Lords, and they must certify that in their opinion it is a proper case to be heard before the House (*g*). The time limited for presenting petitions to the House is within one year from the date of the judgment or order appealed from (*h*).

Presentation of appeal, &c.

The appeal is printed on parchment, and duly lodged in the Parliament office for presentation to the House, and an order is issued thereon for service on the respondents or their solicitors, ordering them to lodge cases in answer to the appeal, which order must be returned to the Parliament office, together with an affidavit of service, within six weeks' time, or, in the case of Irish and Scotch appeals, within eight weeks' time (*i*).

(*e*) As to origin and present constitution of the House of Lords, see ante, pp. 19, 20.
(*f*) 39 & 40 Vict. c. 59, s. 4.
(*g*) Standing Order 2.
(*h*) Ibid. 1.
(*i*) Standing Order 3, and Orders of November, 1876, under Appellate Jurisdiction Act.

Security.

Within one week after the presentation of the appeal, security must be given for the costs of it. The security consists of the appellant's own recognizance, and the payment in by him to the account of the Fee Fund of the House of Lords of the sum of £200, or, instead of that payment, the giving of a bond of two sufficient sureties to the amount of £200. In the event of this latter mode of security being adopted, two clear days' previous notice of the names proposed must be given to the solicitor or agent of the respondent. The recognizance and bond must be returned into the Parliament office, duly executed, within one week from the date of their having issued to the solicitor or agent of the appellant. On default by the appellant in complying with the above requirements, the appeal stands dismissed (*k*).

Printed cases.

The appeal having been lodged, the order served, and the security given, the next step is the lodging by the parties of their cases in the Parliament office. These cases contain the different parties' statements, and must be printed; in English appeals they must be lodged within six weeks from the date of the presentation of the appeal, and in Scotch and Irish cases within eight weeks. The cases must be signed by one or more counsel, who have attended as counsel in the Court below, or who purpose attending as counsel at the hearing in the House (*l*). If the parties are able to agree on their statement of the subject matter, a joint case may be lodged, with reasons *pro* and *con*. In addition to the printed cases or case, a printed appendix, or printed appendices, also have to be lodged, consisting of such documents or parts thereof used in evidence in the Court below, as may be necessary for reference on the argument of the appeal (*m*).

(*k*) Standing Order 4.
(*l*) Ibid. 5.
(*m*) Orders of November, 1876, under Appellate Jurisdiction Act.

Cross appeals.

If any respondent is dissatisfied with the judgment or order complained of by the appellant, he must, within the time above noticed for lodging his case, present a cross appeal (*n*).

Setting down of appeal.

The appeal is set down for hearing on the first sitting day after the expiration of the time allowed for the respondent to lodge his case, or as soon before, at the option of either party, as all respondents' cases have been lodged. On default by the appellant, the appeal stands dismissed (*o*).

Hearing and disposal of appeal.

The appeal in due course comes on to be argued, and is disposed of by the decision of the House, which may make an order as to payment of costs, and provision is made for the taxation of such costs.

(*n*) Standing Order 6. Orders of November, 1876, under Appellate Jurisdiction Act.

(*o*) Standing Order 5.

CHAPTER III.

APPEALS FROM INFERIOR COURTS.

Appeals to be to Divisional Courts.

APPEALS from inferior Courts, which might, under the old practice, have been brought to any Court or Judge whose jurisdiction is now transferred to the High Court of Justice, may be heard by Divisional Courts of the High Court, and the determination of such appeals by such Divisional Courts is final, unless special leave to appeal from the same to the Court of Appeal is given by the Divisional Court by which any such appeal from an inferior Court has been heard (*p*). Every Judge of the High Court for the time being is a Judge for the purpose of hearing and determining these appeals as just mentioned. All such appeals (except Admiralty Appeals, which are assigned to the Admiralty Division) are entered in one list by the officers of the Crown office, and are heard by such Divisional Court of the Queen's Bench, Common Pleas, or Exchequer Divisions, as the presidents of those Divisions from time to time direct (*q*).

County Court appeal.

The most usual appeals from inferior Courts occurring in practice are appeals from County Courts. These appeals may be either by special case (*r*), or by motion (*s*).

(*p*) Jud. Act, 1873, s. 45. It may be noticed that an appeal from the Lord Mayor's Court does not lie to the Divisional Court, but to the Court of Appeal. See *Le Blanche* v. *Reuter's Telegram Company*, L. R. 1 Ex. Div. 408.

(*q*) Order LVIII. r. 19.

(*r*) 13 & 14 Vict. c. 61, s. 14.

(*s*) 38 & 39 Vict. c. 50, s. 6. As to the cases in which a party has a right of appeal, see Pollock and Nicol's County Court Practice, pp. 235–238.

Special case.

A party appealing by special case must within ten days after the County Court decision give notice of appeal in writing to the other party or his solicitor, stating therein the grounds on which he appeals. The notice must be signed by the appellant, his solicitor, or agent, and must be served on the Registrar of the County Court, as well as on the successful party. The notice of appeal does not operate as a stay of proceedings, unless otherwise ordered. Within the same period of ten days, the party appealing must give security to the Registrar of the Court for the costs of the appeal, and if he be defendant, for the amount of the judgment, in case the appeal should be dismissed. The security may be either a bond executed by the appellant and two sureties, or a deposit of money; and if the appellant fails to give security, the Court will not hear the appeal. The case is then drawn up by the appellant or his solicitor, and submitted to the other party, and if possible the same is agreed on between them; but if they cannot agree on it, it is settled by the County Court Judge. It is finally signed by him and sealed with the seal of the Court, and within three days thereafter one copy is deposited with the Registrar of the County Court, and one copy sent to the successful party or his solicitor (*t*). It is also duly entered by the appellant at the Crown Office, for hearing, within the same period of three days, and notice thereof given to the other party, and the appellant must also, four clear days before the day appointed for argument, deliver two copies of the case, at the proper office, for the use of the Judges of the Divisional Court to which such cause has been assigned for argument (*u*). The cause then comes on in due course, and is disposed of by the Divisional Court.

(*t*) Pollock and Nicol's County Court Practice, pp. 240–242.

(*u*) Additional Order of 22nd January, 1877. See Griffith and Loveland's Pr. p. 472.

Motion.

A motion is a new mode of appealing from a County Court. Any person aggrieved by the ruling, order, direction, or decision of a County Court Judge and having a right of appeal may, at any time within eight days after the same shall have been made or given, appeal against it to the Divisional Court by motion instead of by special case, such motion being *ex parte* in the first instance, and granted on such terms as to costs, security, or stay of proceedings as to the Court to which the motion is made seems fit. If the Divisional Court is not then sitting the motion may be made to any Judge of the High Court sitting in Chambers (*x*).

Practice.

The course of practice under this provision is, in the first instance, to obtain from the County Court Judge a copy of his notes made at the hearing before him, and also of the objection on the point of law made before him at the hearing, and this such Judge is bound to furnish on being applied to for it, and at the expense of the party requiring it (*y*). This being obtained counsel is instructed to move the Divisional Court *ex parte*, or if the Court is not then sitting to apply in Chambers to a Judge *ex parte*, and on this application the copy of the Judge's notes signed by the Judge must be handed in to the Judge or the proper officer to receive them (*z*). The application is then either refused or a rule or order *nisi* (*a*) is granted, which is drawn up and duly served on the solicitor for the other party and on the Registrar of the County Court appealed from. The rule or order and the Judge's notes are then taken to the Crown Office and filed there and the appeal entered for argument. Notice is given to the solicitor of the other party of the day for which it has been entered, and in due course it comes on to be heard and is disposed of.

(*x*) 38 & 39 Vict. c. 50, sect. 6.
(*y*) Ibid.
(*z*) See additional order of 22nd January, 1877, Griffith and Loveland's Pr. p. 472.
(*a*) As to a rule *nisi*, see ante, p. 57.

APPENDIX.

I.

A TABLE OF SOME OF THE PRINCIPAL TIMES OF PROCEEDINGS.

AFFIDAVITS	When evidence by consent to be by affidavits, plaintiff's affidavits must be filed within **14** days after consent; defendant's affidavits within **14** days of delivery of list of plaintiff's affidavits; and plaintiff's affidavits in reply within **7** days of delivery of list of defendant's affidavits.
	Notice for cross-examination on, must be served within **14** days after time for filing affidavits in reply.
AMENDMENT	Writ of summons may be amended at any time by leave.
	(As to when pleadings may be amended without leave, see *ante*, p. 54.)
	When an order is obtained for leave to amend, amendments must be made within **14** days.
ANSWER TO INTERROGATORIES: *See* DISCOVERY.	
APPEAL	From a Master to a Judge within **4** days.
	From Chambers to the Queen's Bench, Common Pleas, or Exchequer Divisions, within **8** days.
	To Court of Appeal from interlocutory orders, winding-up orders or in bankruptcy, within **21** days.
	To Court of Appeal from an *ex parte* application within **4** days.
	To Court of Appeal in other cases within **1** year.
	Notice of **14** days if appeal from a judgment, but if from an interlocutory order **4** days.
	Notice of, by a respondent in an existing appeal **8** days, if appeal from a judgment, but if from an interlocutory order **2** days.
	To House of Lords within **1** year, but in case of disability, within **1** year of disability ceasing, and in case of absence within **5** years at utmost.

APPEAL—*continued.*	
	From County Court: When by special case, notice of appeal and security for appeal within **10** days, and case to be transmitted to Court of Appeal within **3** clear days after signature. When by motion, same to be made within **8** days.
APPEARANCE . . .	To writ of summons, if defendant within jurisdiction, within **8** days after service—if not within it, then within time fixed by order.
	Defendant may appear though time expired provided judgment not signed, but must then give notice of appearance.
	Under Bills of Exchange Act, **12** days.
	If defendant appears elsewhere than where writ issued he must on the day he appears give notice thereof.
	When a notice given to a third party (see *ante*, pp. 23, 24), if he wishes to dispute claim, he must appear within **8** days.
BILLS OF EXCHANGE ACT	Actions under, must be commenced within **6** months after bill due. Leave to defend action under, must be obtained within **12** days of service.
BILL OF SALE. . . .	With affidavit must be filed in Queen's Bench Division within **21** days after execution.
CERTIFICATE OF CHIEF CLERK	Time for taking opinion of Judge on, **4** clear days from signature by Chief Clerk.
	Application to vary within **8** clear days from being signed by Judge.
CLAIM, STATEMENT OF	Must be delivered within **6** weeks from appearance.
CONCURRENT WRITS .	May be issued at any time whilst original writ remains in force.
CROSS-EXAMINATION .	Notice for, must be served within **14** days after time for filing affidavits in reply.
COUNTY COURT . . .	Appeal from: *See* APPEAL.
DEFENCE, STATEMENT OF	Must be delivered within **8** days from delivery of statement of claim. But if no statement of claim required then within **8** days after appearance.
	When leave to defend given under Order XIV. (see *ante*, pp. 39–44) then within time ordered, or if no time ordered within **8** days after order.
	Where further defence or reply arises during action, leave to set it up must be obtained within **8** days of its so arising.
DEMURRER . . .	Within the same time as other pleadings in action.
DISCOVERY	Interrogatories may be delivered by plaintiff with statement of claim, or by defendant with statement of defence, or by either of them at any subsequent period before the close of the pleadings. After that only by leave.

DISCOVERY—*continued.*	
	Application to strike out any interrogatories must be made within **4** days of their delivery; affidavits answering interrogatories to be filed within **10** days.
	When notice given to produce certain documents for inspection in the course of the action, the party receiving such notice must within **2** days, if all documents referred to therein have been set out in pleadings or affidavits, or if not, then within **4** days, give notice to the opposite party that within **3** days from delivery of such notice the documents can be inspected by him.
DISMISSAL FOR WANT OF PROSECUTION	If statement of claim not delivered within the **6** weeks allowed.
	If notice of trial not given withiu the **6** weeks allowed from the close of the pleadings.
	If default made in obeying an order for discovery or inspection.
DISTRINGAS . .	Only has effect for **8** days from application to deal with fund.
EJECTMENT . .	In an action for recovery of land, defence may be limited to a part, by serving notice to that effect within **4** days after appearance.
ENTRY OF CAUSE FOR TRIAL: *See* TRIAL.	
EXECUTION	May generally issue immediately after final judgment.
	Writ of, in force for **1** year, but may be renewed for further period of **1** year, and so on from time to time.
	After **6** years from date of judgment, or after change of parties, leave must be given to issue.
GUARDIAN .	Notice of application for a guardian *ad litem* to be appointed to a defendant who has not appeared, must be served **6** clear days before day of hearing.
INSPECTION: *See* DISCOVERY.	
INTERROGATORIES: *See* DISCOVERY.	
JUDGMENT. .	Final judgment by default may be issued at expiration of time limited for appearance, if writ specially indorsed; but if writ for unliquidated damages, then only interlocutory judgment.
	Final judgment may be signed in default of statement of defence if claim for a fixed liquidated amount, but if for unliquidated damages, then only interlocutory judgment.
	Where at trial, judgment not directed to be entered plaintiff must set cause down on motion for judgment within **10** days after trial, otherwise defendant may do so.
JURY	Special notice for, to defendant, same as notice of trial.
	Special notice for, to plaintiff **6** days.

LIMITATION OF ACTIONS	Actions must be brought within the following periods respectively :—
	Advowsons, to recover, **3** adverse incumbencies, or **60** years, or at the utmost within **100** years.
	Assault, **4** years.
	Assumpsit, **6** years.
	Covenant, **20** years.
	Debt, specialty, **20** years.
	Debt, simple contract, **6** years.
	False imprisonment, **4** years.
	Actions against justices, **6** calendar months.
	Land, recovery of, **20** years: but if disability, **10** years from ceasing, the extreme period being **40** years. After the 1st Jan. 1879, the time will be **12** years; but if disability, **6** years from ceasing, the extreme period being **30** years (37 & 38 Vict. c. 57).
	Legacy, **20** years.
	Libel, **6** years.
	Slander, **2** years.
	Trespass to person or goods, **4** years.
	Trespass in other cases, **6** years.
MODE OF TRIAL: *See* TRIAL.	
NEW TRIAL: *See* TRIAL.	
NOTICE	Of action, when required, **1** calendar month.
	Of trial, **10** days, long; **4** days, short.
	For special jury, to defendant, same as notice of trial.
	„ „ to plaintiff, **6** days.
	Of taxing costs in Queen's Bench, Common Pleas, and Exchequer Divisions, **1** day.
PAYMENT INTO COURT	May be made by defendant immediately on being served with writ, or up to delivering his defence; afterwards only by leave.
	Plaintiff may, within **4** days after notice of payment in, or if payment in stated in defence, then before reply, accept payment in satisfaction. If he does this, he gives notice thereof, and taxes his costs; and if not paid within **48** hours he may sign judgment for them.
PETITION .	**2** clear days between service and hearing.
REPLEVIN	In superior Court, bond conditioned to commence action within **1** week.
	In County Court within **1** month.
SERVICE OF WRIT . .	Memorandum of, must be indorsed within **3** days.
REPLY	Must be delivered within **3** weeks from defence.
	Further reply arising pending action, within **8** days after its arising.
REJOINDER	And subsequent pleadings must be delivered within **4** days of previous pleading.
STATEMENT: *See* CLAIM; DEFENCE; REPLY.	

SUMMONS . .	If originating proceedings, to be served **7** clear days before return. If otherwise **2** clear days before return.
TRIAL	Notice of, **10** days, but if under terms to take short notice, then **4** days.
	Notice of, to be given with reply, or at any time after close of pleadings.
	Plaintiff in notice states mode of trial, but defendant may within **4** days of service of the notice give a notice that he requires a jury.
	If plaintiff do not give notice of trial within **6** weeks from close of pleadings, defendant may do so or apply to dismiss action.
	In London or Middlesex plaintiff may enter cause for trial same day ss notice of trial given, or next day, defendant within **4** subsequent days, and if not entered by either party within **6** days notice of trial falls through.
	At the Assizes either party may enter cause for trial, but if entered by both it is tried in the order of the plaintiff's entry.
	New trial should be applied for if case has been heard in London or Middlesex within **4** days of trial or on first subsequent day of sittings; if trial elsewhere than in London or Middlesex, then within first **4** days of next sittings following.
VACATIONS.	Long Vacation from 10th August to 24th October.
WRIT OF SUMMONS . .	Remains in force for **12** months, but may be renewed for **6** months, and so on from time to time, on shewing reasonable efforts have been made to effect service, or for other good reason.

WRIT OF EXECUTION: *See* EXECUTION.

II.

A SET OF PLEADINGS IN AN IMAGINARY ACTION IN EITHER THE QUEEN'S BENCH, COMMON PLEAS, OR EXCHEQUER DIVISIONS OF THE HIGH COURT OF JUSTICE.

(1.) STATEMENT OF CLAIM.

In the High Court of Justice. 1878 S. No. 6.
—— Division.

Writ issued 1 January 1878.

Between John Smith Plaintiff
and
Alfred Brown . . Defendant.

Statement of Claim delivered on the 1st day of February 1878 by Mr. A. B. of &c, Plaintiff's Solicitor.

1. The plaintiff is a general house furnisher carrying on business in Oxford Street in the county of Middlesex. The defendant is a gentleman residing at Kensington.

2. In the month of June 1877 the plaintiff at the request of the defendant supplied to him certain furniture to the value of £150.

3. The plaintiff has furnished to the defendant accounts and invoices of the furniture so supplied and has at various times applied to the defendant for payment of such sum of £150 but the defendant has not paid the same or any part thereof.

The plaintiff claims £150.

The plaintiff proposes that this action should be tried in the City of London (*a*).

(*a*) Or elsewhere, according to circumstances. If no place is stated the place of trial will be Middlesex.

(2.) STATEMENT OF DEFENCE.

IN THE HIGH COURT OF JUSTICE. 1878 S. No. 6.
—— Division.

Between JOHN SMITH . . . Plaintiff
and
ALFRED BROWN. . . Defendant.

STATEMENT OF DEFENCE DELIVERED THE 20TH DAY OF FEBRUARY 1878 BY MR. C. D. OF &C., DEFENDANT'S SOLICITOR.

1. The defendant admits that in the month of June 1877 he requested the plaintiff to supply him with certain furniture. The plaintiff however never supplied him with the furniture required but did send and leave at the defendant's residence certain other furniture of an inferior quality and in other respects of a different description from that ordered.

2. The defendant has never accepted the said furniture so sent but has always refused to accept the same and has required the plaintiff to take the same back and has offered to return it to the plaintiff but the plaintiff has refused to receive it back.

(3.) REPLY.

IN THE HIGH COURT OF JUSTICE. 1878 S. No. 6.
—— Division.

Between JOHN SMITH . . . . Plaintiff
and
ALFRED BROWN. . . Defendant.

REPLY DELIVERED THE 15TH DAY OF MARCH 1878 BY MR. A. B. OF &C., PLAINTIFF'S SOLICITOR.

The plaintiff joins issue on the defendant's statement of defence (*b*).

(*b*) For various forms of proceedings throughout an action, see Griffith and Loveland's Pr. pp. 479–553.

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